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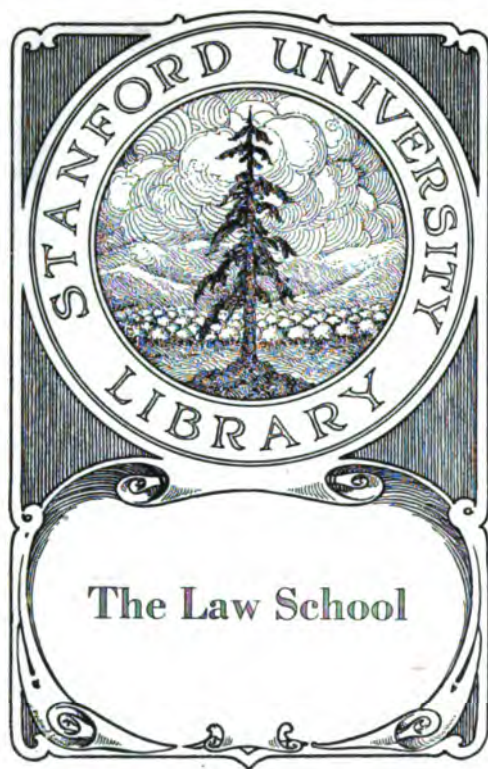
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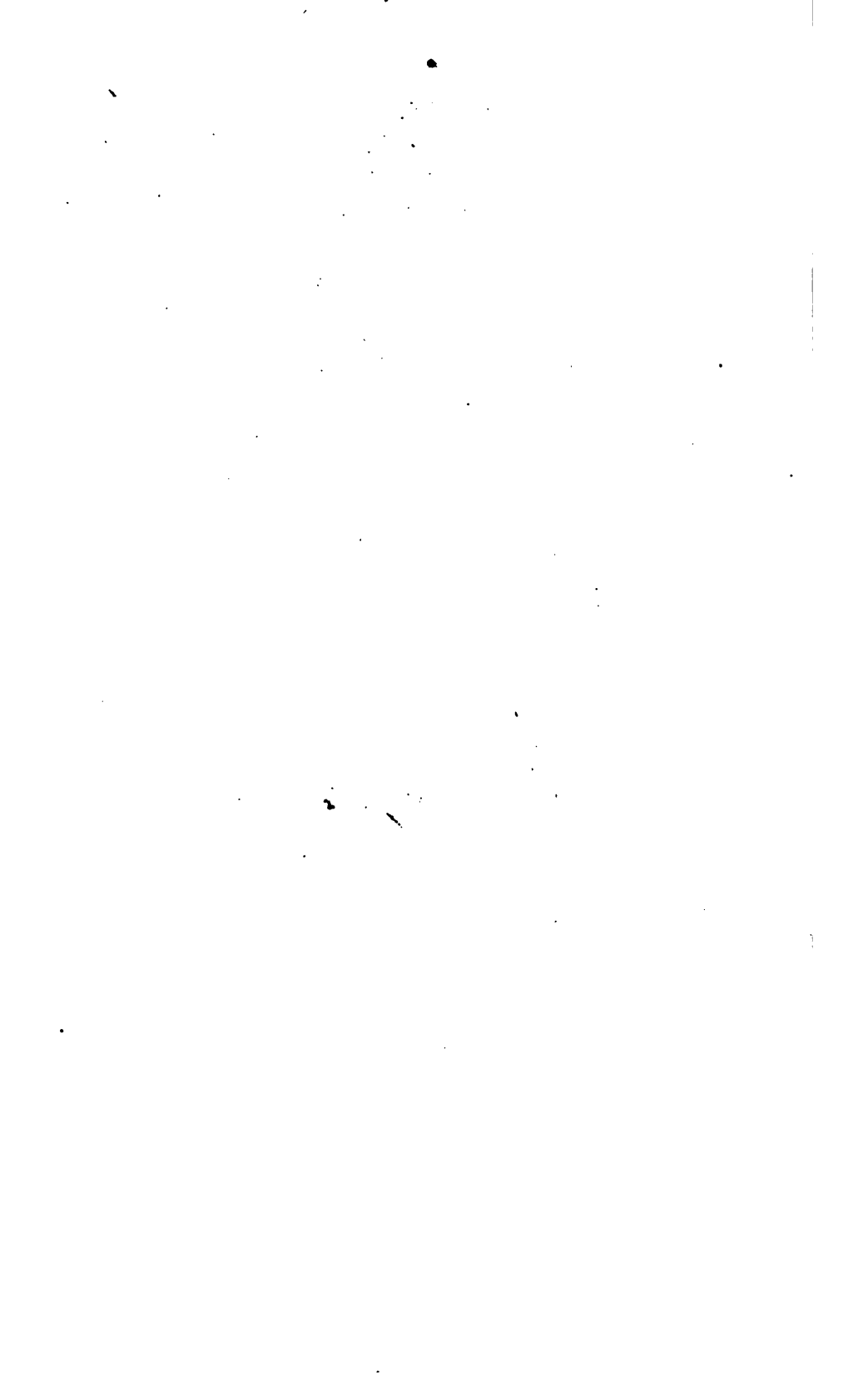
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H.L. GILLASPIE.









REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, ESQBS.,

Now Reprinted in Full.

Gillaspie

VOL. XXVI.

CONTAINING CASES DECIDED IN THE COURT OF KING'S BENCH, IN THE
TWENTY-SECOND, TWENTY-THIRD, TWENTY-FOURTH, AND TWENTY-
FIFTH YEARS OF THE REIGN OF GEORGE III.

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IN

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TWENTY-SECOND, TWENTY-THIRD, TWENTY-FOURTH, AND TWENTY-FIFTH YEARS OF THE REIGN OF GEORGE III.

FROM THE MANUSCRIPTS OF

THE RIGHT HON. SYLVESTER DOUGLAS,

BARON GLENBERVIE.

AND ALSO FROM THE MANUSCRIPTS OF

MR. JUSTICE LAWRENCE, MR. JUSTICE LE BLANC,
MR. GEORGE WILSON, ETC.

VOL. III.

BY HENRY ROSCOE, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,

PUBLISHERS AND IMPORTERS,

NO. 197 CHESTNUT STREET.

1853.



PREFACE.

It was at one period the intention of Lord Glenbervie to complete the series of Reports originally published by him in the year 1782, by adding the decisions of the Court of King's Bench, from Trinity Term, 21 Geo. III., to Michaelmas Term, 25 Geo. III., when the Reports of Messrs. Durnford and East commence. With this view he had prepared, in many instances, the statements of the cases, and had made notes of the arguments of counsel, and of the judgment of the Court.

Lord Glenbervie having relinquished the design of preparing these Reports for the press, the MSS. were placed in the hands of Mr. Serjeant Frere, the Editor of the 4th Edition of "Douglas's Reports," by whom considerable progress was made towards their publication. The statements of the whole of the cases in the fourth volume were prepared, and to many of them the arguments and judgments were added. The cases from Michaelmas Term, 22 Geo. III., to Michaelmas Term, 24 Geo. III. (now comprised in the third volume), were, however, left almost untouched, either by Lord Glenbervie, or by Mr. Serjeant Frere.

In this state the MSS. were put into the hands of the writer of this Preface, accompanied by the contemporary note-books of Mr. Justice Le Blanc, Mr. Justice Lawrence, and of Mr. George Wilson, through the liberality and kindness of H. P. Standly, Esq., and Thomas Le Blanc, Esq., the present Master of the Court of King's Bench. In addition to these highly valuable sources of information, he was furnished with two small volumes containing notes taken by Mr. Justice Buller and by Lord Glenbervie himself, and also with some of the note-books of Sir Thomas Davenport and of Mr. Bowyer. Several volumes of notes by an unknown hand, apparently taken with care and accuracy, were also added. From these copious materials the writer has compiled nearly the whole of the third volume, and has supplied the arguments and judgments in the fourth volume, not inserted by Mr. Serjeant Frere. In preparing the cases, he found the

notes of Mr. George Wilson most valuable for their fulness and apparent correctness, and by a collation of these with the copious notes of Mr. Justice Le Blanc, the third volume of the present Reports has been principally prepared, though the notes of the other contemporary reporters were frequently found useful in elucidating doubtful passages and in supplying deficiencies. The mode thus adopted of preparing the Reports was that which was practised by Lord Glenbervie himself, whose own notes do not appear to have been very copious, and who relied much upon the labors of his friends. "The judgments of the Court," he observes in his preface, "I could have wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither wrote short-hand nor very quickly. Memory, however, while the case was recent, supplied, at home, many of the chasms which I had left in Court; and by comparing and, as it were, confronting a variety of notes taken by others with my own, I was frequently enabled to recall and insert in my report material passages which I should otherwise have lost."

Of a large proportion of the decisions reported in these volumes, short, and, in many cases, imperfect notes have been long before the profession, in various text-books, in the notes to later reported cases, and in the arguments of counsel. This circumstance will not affect the value of the present publication, when the distinction between the few lines in which a text-writer embodies the effect of a decision, and a full statement of the case, with the arguments of the counsel and the judgment of the Court is considered. In some instances, copious and accurate reports of the cases are to be found, as in the settlement cases reported by Mr. Caldecott, between Trinity 22 Geo. III. and Trinity 24 Geo. III. These have been omitted in the preparation of the third volume, and a reference substituted to Mr. Caldecott's Reports. In every instance, indeed, where a note or report of the same case has appeared, a reference to the volume in which it is inserted will be found.

For the notes appended to the cases in the third volume, and for those which occur after page 190 in the fourth volume, the writer of this preface is responsible. His object in adding them has been to state, as succinctly as possible, the later decisions upon the points to which the principal case refers.

H. R.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Michaelmas Term,

IN THE TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.

REX v. Inhabitants of LANGHAM. Nov. 10, 1781.

(Reported CALDWELL, 126.)

Gillaspie

PLANTAMOUR and others v. STAPLES,¹ Nov. 13.

Insurance of ship Duras, "at and from, &c., during her stay and trade, &c., until her safe arrival back at her last port of discharge, &c., upon any kind of goods, and upon the body, &c., of the ship." The ship being lost on the voyage, the goods were transhipped and forwarded by another vessel. Held, that the underwriters were liable for an average loss on the goods, arising from the capture of the last-mentioned vessel.

THIS was an action on a policy of insurance of the ship Duras, "at and from Marseilles to Madeira, the Cape, and the isles of France and Bourbon, and to all ports and places where and whatsoever in the East Indies and Persia, or elsewhere beyond the Cape of Good Hope, from port to ports, and from place to places; and during her stay and trade at all ports and places, and until her safe arrival back at her last port of discharge in France, upon any kind of goods, and also upon the body, &c., of the ship."

There was also a count for money paid, laid out, and expended. The cause was tried before Lord MANSFIELD at Guildhall, at the sittings after Trinity Term, and a verdict was found for the plaintiffs for £66 13s. 9d. subject to the opinion of the Court on the following case:

The plaintiffs are merchants at Geneva; and on their own account and risk, by means of their agents at Marseilles, were interested in bullion, and goods, and merchandises *shipped there on board the ship Duras, consigned [*2]

¹ S. C. 1 T. B. 611 (s); but without the arguments of counsel.

to the plaintiffs' correspondents at Pondicherry, with directions to barter or sell the same on their account, and to make all the returns on the same to Europe in other goods, the produce or manufacture of India. The plaintiffs were also interested in the said ship *Duras*. The ship *Duras* sailed from France, on the voyage insured, in June, 1776, and in the outward-bound voyage was totally lost at the Isle of France, in April, 1777. The goods on board the said ship sustained damage, but great part of the bullion, and a considerable part of the goods, were saved, and, without any authority from the underwriters, sent forward in another ship to the plaintiffs' correspondents at Pondicherry, who received and disposed of the same, and, under the plaintiffs' orders, invested the produce in other goods, the produce and manufacture of India, and shipped the same, to the plaintiffs' account, on board a ship called the *Père de Famille*, bound to France.

The *Père de Famille* sailed from Pondicherry for France in August, 1778, and in the course of her voyage home was condemned at the Isle of France as unfit to proceed to Europe; whereupon the plaintiffs' goods were put on board another ship, called the *Louisa Elizabeth*, bound for France; which ship, with the plaintiffs' goods so on board, sailed for France, and was afterwards taken by an English privateer, and has since, with all her cargo, been condemned.

On the 29th of August, 1778, several of the underwriters on the policy signed a memorandum thereon, whereby they agreed to run the risk on the goods saved, as aforesaid, in any other ship or ships until their safe arrival in France; but which agreement the defendant, and several others of the underwriters, refused to sign, or to give their consent to. The defendant has paid the whole of the average loss occasioned by the loss of the ship *Duras*, and by the damage of the plaintiffs' goods then on board of her.

By the capture of the ship *Louisa Elizabeth*, and of the plaintiffs' goods so on board her as aforesaid, the plaintiffs sustained a loss of £12 2s. 9d. per cent. on the sums subscribed on the said policy, which has been paid by all such of the underwriters as signed the memorandum of the 29th of August, 1778.

The questions for the opinion of the Court were :

Whether the defendant is liable to pay the said loss *of £12 2s. 9d. per cent. which the plaintiffs have so sustained by the capture and condemnation of the ship *Louisa Elizabeth* and her cargo; or if not, whether the plaintiffs are entitled to any, and what, return of premium? [*3]

Pigott, for the plaintiffs.—The plaintiffs are entitled to recover the whole loss. The only question is, whether this loss was occasioned by the loss of the first ship, the *Duras*. The object of the insurances to India is to cover the trade there and back, and to protect the goods in all their changes till their return to France. The loss of the *Duras* makes no difference, if nothing improper was done by the plaintiffs or their agents after that event. It is clear that if the *Duras* had arrived in safety in India, and the goods had been altered, and the same ship had brought back the new goods, the latter would have been under the protection of the policy. The transaction was fair, and the goods were disposed of to the best advantage. If the Court should be of opinion against the plaintiffs, still the voyage is divisible, and there must be a return of premium.

Haworth, for the defendant.—The policy is on goods on board the ship *Duras*. As soon as that ship was lost, the policy ceased; and the parties were entitled to claim a total or partial loss, according to the circumstances. It was necessary, indeed, to take the goods which had been saved to a market, but the underwriters were not to run the risk of other goods in another ship. The underwriters have nothing to do with any subsequent voyage.

With regard to the return of premium, *Bermon v. Woodbridge*, B. R. T. 21 Geo. 3, ante, vol. ii. p. 781, is decisive. Though several places are mentioned, there is but one voyage.

LORD MANSFIELD.—The question is, whether the ship to Europe was necessary to the salvage. It is admitted that the ship to Pondicherry was so. I see no doubt. It is also admitted that what was done was the very best that could be done. The purchase of other goods was necessary to get the money home. The underwriters are liable.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—I cannot find any case decided where this mode of bringing home the goods has been adopted; but in *Milles v. Fletcher*, B. R. T.

[*4] 19 Geo. 3, ante, vol. i. p. 281; it was determined generally, *that the captain has the power to do everything for the benefit of all concerned. See *Read v. Bonham*, C. B. M. 2 Geo. 4; 3 B. & Bingh. 147; 8 Taunt. 775, S. C.; *Morris v. Robinson*, B. R. T. 5 Geo. 4, 3 B. & C. 196; 5 D. & R. 35, S. C.

Judgment for the plaintiffs.

WHITE, *dem.* WHITE, *v.* WARNER.¹ Nov. 13.

Devise by R. W. to his eldest son S. W., and the heirs of his body lawfully begotten; and for default of issue of his said son S., then to his son H. W. and the heirs of his body. S. W. died in the lifetime of the testator, leaving issue. Held that the devise to S. W. had elapsed, and that the remainder to H. W. vested in possession immediately on the death of the testator.

THIS was a writ of error from a judgment of the Court of King's Bench in Ireland in an ejectment for lands, &c., in the county of Cork, in which a special verdict had been found; and on that special verdict the Court of King's Bench in Ireland had given judgment for the lessor of the plaintiff, Warner, the present defendant in error. The special verdict stated,⁴

That by settlement made on the marriage of Simon White, the father of Richard White, the lessor of the plaintiffs, certain lands, &c., in Ireland, were by Richard White, father of the said Simon White, settled on the said Simon White for life; remainder to his first and other sons, in tail male; remainder to the said Richard, the father of the said Simon, in fee: and certain other lands were, by the same deeds, settled on the said Simon, in tail male; remainder to the said Richard White, the father in fee. Simon White entered by virtue of the settlement, and the marriage took effect. The said Richard White, the father of Simon, being seized of part of the estate which was not comprised in the settlement, and being also seized of other lands and tenements in the county of Cork, and having issue the said Simon White, his eldest son, and Hamilton White, his second son, the present plaintiff in error, and a daughter, Margaret, married to Richard Longfield, Esq., and no other issue, by will, dated the 1st of January, 1775, after devising estates of the annual value of £160 to Richard White, the lessor of the plaintiff, in tail general, the rents to be paid him from the time of sixteen years of age, and *estates of £100 per annum to his two next grandsons, brothers

[*5] of the said Richard White, the lessor of the plaintiff, and an estate at Carberry to his son Hamilton, the plaintiff in error, in tail general, remainder to Simon White in tail general, remainder to Margaret Longfield in tail

¹ S. C. 6 T. R. 517; but without the arguments of counsel. *Ante*, vol. i. p. 345 (n); 11 East, 551 (n).

⁴ See the special verdict more fully stated, 3 Br. P. C. 435, 2d. edit.

general, remainder to his own right heirs, devised all the rest and residue of his estate in the manor, lands, and town of Bantry, in the county of Cork, that had not been already settled on his eldest son Simon White's marriage, and all his right, title, &c., to the said manor, &c., together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son Simon White, and the heirs of his body lawfully begotten; and for default of issue of his said son Simon, then he devised his said entire estate of Bantry to his son Hamilton White, the plaintiff in error, and the heirs of his body; and for default of issue of his said son Hamilton, then he devised his said entire estate of Bantry to his daughter, Mary Longfield, for her life, and after her death to the heirs of her body; remainder to the said testator's own right heirs; and made his said eldest son, Simon White, his sole executor, and residuary devisee and legatee. Simon White, the testator's eldest son, died on the 2d of September, 1776, in the lifetime of his father, the said testator, Richard White, leaving issue of the said marriage the lessor of the plaintiff, his eldest son and heir, under age, and three other sons and four daughters. The said Richard White, the testator, died on the 27th of September, 1776, without altering his will, having been informed of and knowing the death of his said son Simon. The said Richard White, the testator, had been a barrister. Hamilton White, the plaintiff in error, was, at the time of the making of the will of the said Richard White, about thirty-five years old, and had never been married. The estate comprised in the settlement was of the annual value of £1008; and the lands, &c., mentioned in the ejectment, of the annual value of £2300. The plaintiff in error, Hamilton White, after the death of his father, took possession of the several premises in Bantry, not settled on the marriage of Simon; for which this ejectment was brought in the Court of King's Bench in Ireland in 1780, on the demise of Richard White, the eldest son and heir of Simon White, and the testator's grandson.

The writ of error was argued in Trinity Term last by **Davenport* [*6] for the plaintiff in error, and by *Bower* for the defendant in error; and again in this term by *Wallace*, Attorney-General, for the plaintiff in error, and by *Wilson* for the defendant in error.

For the plaintiff in error were cited the following cases: *Brett v. Rigden*, C. B., H. 7 Eliz., Plowd. 340; *Hartop's case*, B. R., T. 33 Eliz., Cro. Eliz. 243; *Fuller v. Fuller*, B. R., H. 36 Eliz., Cro. Eliz. 422; *Hutton v. Simpson*, Canc. 1717, 1 P. W. 397, 2 Vern. 722, Prec. in Ch. 439, Eq. Ca. 216, S. C.; *Goodright v. Wright*, B. R., H. 1717, 1 P. W. 397, 1 Str. 25, S. C.; *Hodgson v. Ambrose*, B. R., E. 20 Geo. 3, ante, vol. i. p. 337. By these cases, it was contended, two rules were established: 1. That a devise is void where the devisee dies in the lifetime of the testator; 2. That the devise over, in such case, vests immediately in the next taker.

The question in the present case is, whether the eldest son of Simon, the eldest son of Richard White, the testator, or Hamilton, the second son of the testator, is entitled to the lands not comprised in the settlement, and devised to Simon; that is, whether, by the death of Simon, the devise to him and his issue is lapsed, and becomes vested in Hamilton. The present case is attempted to be distinguished from the authorities above cited; and it is said that here the first devise is to the heir-at-law of the testator; which alters the case; because, by the words of the will, the second son is not to take until after failure of issue of the first son; and this distinction is founded on a *dictum* of POPHAM, J., in *Fuller v. Fuller*. This question, however, could not arise in *Fuller v. Fuller*, and therefore the opinion of POPHAM was extrajudicial. If that *dictum* has any meaning, it shows that the issue must take by purchase; for, unless they took by purchase, the next limitation to

the second son could not take effect: as a contingent remainder it could not, for want of a particular estate to support it; and as an executory devise it could not, for it would be too remote. The consequence, then, would be that this devise would be construed in a different sense from the other devises in the very same words. If, on the contrary, the eldest son of the first devisee took an estate by descent, he would take an estate in *fee*, which would be a [7] larger estate *than the will intended. It has been said that no precise case has been stated where the lapsed devise was to an heir-at-law; but in *Hutton v. Simpson* there were two daughters who were coheirresses, which amounts to the same thing. In *Hodgson v. Ambrose*, the Court asked the counsel whether he contended that the first devise was not lapsed; and he replied that he could not, after the decision in *Goodright v. Wright*. In the present case it has happened that the heir is not totally unprovided for, having another estate under the settlement; but that circumstance could make no difference.

On the other side, for the defendant in error, in support of the judgment of the Court of King's Bench in Ireland, it was thus argued: The eldest son of Simon White, the eldest son of the testator, is entitled to this property as heir-at-law of the testator. The question depends upon two well-established rules: 1. That an heir-at-law is not to be disinherited but by express intention; 2. That what is not given away descends to the heir-at-law. There is a plain distinction between a devise of this kind to a stranger and to an heir-at-law,—a distinction founded in plain sense, and supported by decided cases, and by the *dicta* of judges. A stranger can only look to the will for his title; but an heir-at-law looks to the will, not for his title, but to see in what manner it is given away from him. Where the devise is to a stranger, and, for want of issue, to another stranger, it is the plain intention of the testator to give nothing to the heir. But where the first devise is to the heir-at-law, the case is entirely different. Hartop's case is strong for the plaintiff in error. The Court refused to resolve the case, but awarded a *melius inquirendum*; which must have been on account of some fact extrinsic of the will, and could only have been to inquire whether the first devisee was the heir-at-law of the testator. The *dictum* in *Fuller v. Fuller* is not an extrajudicial opinion, but an explanation of the rules on which the Court grounded their decision. The opinion of POPHAM, J., in that case, is not contradicted in any other case, or by any other *dictum*; but, on the contrary, is much confirmed by what fell from Lord MACCLESFIELD in delivering the resolution of the Judges in *Goodright v. Wright*, as reported in *Strange*, vol. i., p. 32. But it is said that [8] the observation *of Lord MACCLESFIELD is omitted in the report in P. Williams, a contemporary reporter. It cannot, however, be supposed that *Strange* would insert what had never been said. In *Hutton v. Simpson*, the question was never decided. The Chancellor said that it was a mere legal question, and that he would leave it to a court of law, and give no relief. Again, that was not the case of an heir-at-law, but of one of two coheirs, which is very different; for one of two coheirs takes the whole by devise, and not by descent; and it was so resolved in *Reading v. Royston*. [The Attorney-General said that *Hutton v. Simpson* must have been decided, for that he himself had succeeded to part of the estate in question. *Wilson* replied that Lord COWPER's opinion had probably been acquiesced in.] *Goodright v. Wright* was the case of a stranger, and not of an heir-at-law; and so, probably, was the case of *Busby v. Greenslate*, B. R., T. 7 Geo. 1; 1 Str. 445. *Ambrose v. Hodgson* was a devise to one sister and the heirs of her body, remainder to another sister and the heirs of her body; and the sisters were not heirs-at-law of the testator, there being a brother alive.

It is said to be difficult to describe the interest which the heir-at-law will
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take, and that the testator did not intend him to take an estate in fee. Whichever way the case is decided, the intention of the testator cannot be wholly carried into effect. He clearly intended that the issue of the first devisee should take some estate; and the question is, whether his primary intent in favor of that issue, his heir-at-law, shall not prevail over his secondary intent. It cannot be denied that the will might have been so worded as to give an estate to the heir-at-law; as if the testator had said, "I give my estate to A., and the issue of A.; and when my estate so given to A. and his issue shall be spent, and the issue extinct, and not till then, I give it to B.," &c. Now the testator has said in his will what is tantamount to this. The general intent and scheme of the will require that the Court should thus construe the words used. It was the intent to give one estate to the elder, and another to the younger branch of the family. Upon the whole, then, it is contended,—1. That there is such a distinction between this case and all the decisions cited, as to take off their authority; and, 2. That there is a manifest intent of the testator to give nothing to *the younger son till the issue of the elder son should be extinct, and that therefore till that time the estate goes to the heir-at-law. [*9]

Lord MANSFIELD, after stating the facts of the case, said,—The Court of King's Bench in Ireland gave judgment for the lessor of the plaintiff, the eldest son of Simon. In order to support that judgment, they must have gone upon the ground that the testator meant to provide for the contingency of his son dying in his (the testator's) lifetime, so as to give it to his children as purchasers. My wish decidedly has been to support the claim of the lessor of the plaintiff, and I have struggled hard to distinguish this case from the letter and meaning of the authorities, for no one can doubt that the testator's intent was to give the whole family estate together. His will is a continuation of the settlement, and he could have no idea of his eldest son's children being set aside in favor of his second son. At first, the argument of intention might have had weight; but the law on this head is now so settled, that it is impossible, even if it were wrong, to alter it. The case of such a death in the lifetime of the testator happens frequently. I have several cases now in my memory.

Consider what the settled law is. At common law, lands were not deviseable, and therefore little is to be found in the books, before the statute of wills, on the subject of devises of lands; but with regard to legacies of personalty it was early settled, that if the legatee died in the lifetime of the testator, the legacy lapsed, and no representative could claim in his right. If the legatee was not *in esse* at the time of the death of the testator, the legacy was gone, *Elliot v. Davenport*, Canc. M. 1705, 1 P. W. 83; *Stone v. Evans*, Canc. M. 1740, 2 Atk. 86; *Maybank v. Brookes*, Canc. M. 1780, 1 Bro. C. C. 84; *Lowndes on Legacies*, 408. The first case as to the devise of lands, after the statute of wills, was *Brett v. Rigden*; where it was held that the word *heirs* was only used to describe the extent of the interest; and that the heirs not being the object of the testator's intent, the devise was lapsed and void. In *Hartop's* case the devise was of an estate-tail with remainders over. Originally, perhaps, there might have been a distinction made between *Brett v. Rigden* and the case where the devisee is also the heir; but the authority of *Hartop's* case, and of *Fuller v. Fuller*, is strong against such a distinction, and every one claiming under a *will must take as a purchaser. It is said that there is no case where the first [*10] devise was to an heir-at-law; but that assertion does not appear to be correct; for in *Hutton v. Simpson*, and in an old case of *Packman v. Cole*, B. R., E. 1658, 2 Sid. 53, 78, the devisees were coheirs, and no notice is taken of the distinction. But supposing that the heir-at-law is to take, how is he to

take? If, by implication, under the will, there is an end of the distinction of heir. He must then take by purchase, and is not more favored than another. Does he then take by descent?—and if by descent, how? Does it descend to him in fee *quousque*? If so, it is still the same as if the first devise had been to a stranger. The last argument for the lessor of the plaintiff is, that as the heir cannot be disinherited without express words, the whole will is overturned. But the testator may disinherit his heir by giving the estate away from him, or by giving it to him in a qualified manner; and here he has disposed of it. I cannot get over the letter and reason of the authorities. To be sure there is a *dictum* of POPHAM, but that is out of the case. There is also another position of his which cannot be supported—that if land be given to a man and his heirs, and he dies, his heirs may take, which cannot be.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—I am of the same opinion. I think that the event which has happened was not provided for by the testator in his will. I incline to think that Hartop's case was that of an heir-at-law. Had it stood over on the ground suggested in argument, the Court could not have given the opinion they did. The *dictum* of POPHAM was not intended to be confirmed by Lord PARKER. He says, in the course of his argument, that POPHAM was mistaken. If he had laid down the distinction clearly, it is not likely that Peere Williams would have omitted it. As to the intent of the testator, he had no inclination in favor of the issue of his eldest son. It was the eldest son himself who was the object, and it is described in what manner he shall take. An estate by implication cannot be raised against an express devise. The case put for the lessor of the plaintiff will not hold. The words, "and not till then," &c., would not carry the case any further. The limitation over would be a remainder, and would take effect immediately.

Judgment reversed.

*Upon this judgment a writ of *error* was brought in Parliament, 3 [*11] Br. P. C. 435, 2d ed.; S. C. cited Jones v. Morgan, Canc. 1783, 1 Br. C. C. 219; and after hearing counsel the following question was put to the Judges: "Whether, in the event which had happened, the defendant, Hamilton White, took any and what estate in the lands of Bantry, under the devise to him for default of issue of Simon White?" The Lord Chief Baron, having taken time to consider the question, delivered the unanimous opinion of the Judges present, that the defendant, Hamilton White, took an estate-tail in the said lands, under the devise to him for default of issue of Simon White. Whereupon it was ordered and adjudged that the judgment of the Court of King's Bench in England, reversing the judgment of the Court of King's Bench in Ireland, should be affirmed; see Doe dem. Earl of Lindsey v. Colyear, B. R., M. 50 G. 3, 11 East, 547; Brown v. Higgs, Canc. 1799, 4 Ves. 718.

MOCATTA v. FRANCO. Nov. 15.

A. offered to B. £20,000 of a proposed government loan; which B. agreed to take, provided he should have the £20,000 if A. was not wholly excluded. A. applied to government for £200,000, but had only £35,000 allowed him; whereupon he offered to B. £3500. Held, that B. was entitled to receive from A. the whole £20,000.

THE defendant, being about to apply to government for part of a loan which was to be raised, offered the plaintiff, by letter, that he (the defendant) would let the plaintiff have £20,000 of the approaching loan in his (the de-

defendant's) name; to which the plaintiff assented, provided that he should have the £20,000 if the defendant was not wholly excluded. The defendant applied to government for £200,000 of the loan, but had only £35,000 allowed him; on which he offered the plaintiff £3500 of it, being the proportion which £20,000 bore to £200,000, the whole sum which he had written for. On this the plaintiff sued the defendant on his promise, to recover the profit which he would have made on £20,000 if that sum had been allowed him by the defendant. The jury found a verdict for the plaintiff with £1800 damages, being less than the full profit on £20,000. A new trial was moved for on two grounds: 1. That it was *nudum pactum*; and 2, on the terms of the agreement. A rule to show cause having been obtained,

Wallace, A. G., Dunning, and Morgan, showed cause.—*This is not a *nudum pactum*, for the plaintiff bound himself at all events to [*12] take a certain portion of the loan; and if it had been a bad thing he must still have taken it, and being a good thing he is entitled to the benefit of it. Besides, in consequence of this agreement the plaintiff does not enter into any other subscription from which he might have derived the benefit which he seeks to recover in this action. There was also a benefit to the defendant, for he was desirous of offering a large sum to government, which he would not have ventured to do without the participation of some other person, and the plaintiff refused to take any unless the defendant would give him the whole £20,000. They cited *Dutch v. Warren*, Cor. King, C. J., 1 Str. 406.

Bearcroft, Lee, Baldwin, and Erskine, contra.—This demand is at all events ungenerous; and if any legal objection, however strict, can be made on the part of the defendant, the Court will be glad to attend to it. Taking this to be a contract, it is *nudum pactum unde non oritur actio*, for no advantage could be derived by the defendant from his suffering the plaintiff to have this sum. But it is said, that supposing it to have been a losing bargain, the plaintiff would have been compelled to take this portion of the loss off the defendant's hands. The answer is, that unless the plaintiff had taken this sum, the defendant would never have applied for so much to government, and there would have been no loss to be sustained by him. But supposing that it is not *nudum pactum*, the defendant has performed his contract according to the rational construction of it. It is obvious that the plaintiff was only to receive a certain relative proportion of the sum subscribed for; for suppose that government had only permitted the defendant to take a less sum than £20,000, it would have been impossible for him to have completed the contract according to the construction of it contended for on the other side. Again, the defendant may be considered as an agent employed by the plaintiff in this transaction; and if so, it is sufficient if he does for him as well as he can. There is also another objection to this action. The contract is prohibited by the statutes against stock-jobbing, 7 Geo. 2, c. 8. It is a contract for a share in a security which the defendant had not at the time of the contract.

*Lord MANSFIELD.—In the argument it appears to be forgotten that we are to try the cause on the evidence. Whether the plaintiff [*13] acts honorably or not must depend upon the terms of the agreement. If he was to have only such a proportion as his sum should bear to the whole £200,000, he acts dishonorably; otherwise not. The first proposal did not come from the plaintiff. It was an offer made by the defendant; and the plaintiff accepted it on condition that he should have the sum for which he stipulated, if the defendant was not wholly excluded. This is the meaning of the agreement, which was made with a view to prevent the chance of the plaintiff having nothing at all. As to the consideration, if there is any, it is

enough to take the case out of the rule of *nudum pactum*. Consider the mode of raising the loan. A few people only have lists, and government have nothing to do with the under-subscribers. The consideration is, that I answer to government, and you to me. It would be very inconvenient to hold that this is a *nudum pactum*. The defence of the stock-jobbing acts fails. This was a transaction before the terms of the loan were known.

The rest of the Court concurring,

The rule was discharged.

PECKHAM v. FARIA.¹ Nov. 15.

A. and B. came to the plaintiff's warehouse, and agreed on a parcel of goods for A.; and B. said he would guarantee the payment. A. afterwards came alone, and ordered other goods, when the plaintiff sent to B., and asked him whether he would engage for A. B. replied, "I will pay you if he does not." The goods were subsequently delivered to A. Held, that this was a collateral promise by B., and required to be in writing by the statute of frauds.

THIS was an action of assumpsit for goods sold and delivered to one Sylva on account of the defendant. At the trial the only witness examined was the book-keeper of the plaintiff, who proved that the defendant and Sylva came to the plaintiff's warehouse and agreed on a parcel of goods for Sylva, when the plaintiff said he did not know Sylva, and would the defendant answer for him? The defendant said that he would guarantee the payment. Sylva came, on another occasion, by himself, and ordered other goods; on which the plaintiff sent to the defendant to inform him of it, and asked if the defendant would engage for Sylva. The defendant said, "You may not only ship that parcel, but one, two, or three thousand pounds more, and I [*14] *will pay you if he does not.*" This promise was made before the delivery of the goods to Sylva, and credit was given to the defendant's promise, the plaintiff knowing little or nothing of Sylva. For this last parcel of goods the action was brought. On the part of the defendant it was contended that this promise, not being in writing, was void by the statute of frauds. Lord MANSFIELD, before whom the cause was tried, stated that he believed the point had been already determined; but as no one at the bar recollected the case, a verdict was taken for the plaintiff, with leave for the defendant to move to set that verdict aside and to enter a non-suit. A rule to show cause having been obtained,

Wallace, A. G., and Dunning, showed cause. They read the case of Jones v. Cooper, B. R., M. 15 Geo. 3, Cowp. 227, and admitted that, unless the present case could be distinguished from that decision, the rule must be made absolute. But they contended that, upon the evidence, as it appeared on the trial in this case, the credit was given to the defendant alone, and that this was not a collateral undertaking on the part of the defendant. The plaintiff knew nothing of Sylva, and expressly refused to trust him. Before Jones v. Cooper, the distinction of the promise being before or after the delivery of the goods was very material; and it is still very material in this sense, that it leaves the question, whether the goods were supplied on the credit of the person to whom they were delivered or of the defendant, open to the jury. That is a question proper for the determination of the jury, who have decided it; and the Court will not disturb the verdict. The jury also may have thought that the goods were delivered on the joint credit of the defendant and Sylva, and in that case also the verdict ought not to be

¹ S. C. cited 2 T. R. 80.

disturbed. To hold a case like this within the statute would be making the statute itself an instrument of fraud.

LORD MANSFIELD.—Before the case of *Jones v. Cooper*, I thought there was a solid distinction between an undertaking after credit given, and an original undertaking to pay, and that in the latter case the surety, being the object of the confidence, was not within the statute;¹ but in **Jones v. Cooper* the Court was of opinion that wherever a man is to be called [*15] upon only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance. Here, by the words of the promise, Sylva was to be called on first, the defendant undertaking to pay if Sylva did not pay. The case is not distinguishable from *Jones v. Cooper*, and the words of the statute are very strong.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—*Jones v. Cooper* was fully as strong for the plaintiff, for there the original debtor was known to be worth nothing.

Rule absolute.*

¹ See *Mawbrey v. Cunningham*, Sittings after H. T. 1778, cited Cowp. 228. In an action for goods sold and delivered, the case on evidence was this: The plaintiff had agreed with one Holbroke, a butcher, for six oxen: five were delivered, but the sixth was refused unless the money for it were paid, on which the defendant said he would pay the plaintiff for it next week at Bristol Fair. On this promise the plaintiff delivered the sixth ox, which Holbroke, in company with the defendant, drove away.

BULLER, J., held the case within the statute of frauds, on the authority of *Jones v. Cooper*, in which he said *Mawbrey v. Cunningham* had been overruled. *Parsons v. Walter*, Bridgewater S. A. 1781.

* “The general line now taken is, that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds.” Per BULLER, J., *Watson v. Wharam*, B. R., M. 28 G. 3, 2 T. R. 81. See also *Anderson v. Hayman*, C. B., H. 29 G. 3, 1 H. Bl. 121; *Dixon v. Bromfield*, B. R., M. 1814, 2 Chitty Rep. 205; *Colman v. Eyles*, 1817, coram Ld. Ellenborough, 2 Stark. N. P. C. 62.

JONES v. BARKLEY. Nov. 15.

(Reported ante, vol. ii., p. 694, a.)

*GRANT v. PARKINSON.¹ Nov. 16.

[*16]

Policy upon any kind of goods, &c., valued at £1000, being on profits expected to arise on the cargo of the ship in the event of her safe arrival at Quebec, and in case of loss the insurers agree to pay the same without any other voucher than the policy. Held, that this policy was not void within the 19 G. 2, c. 37, but that the insured were entitled to recover.

THIS was an action on a policy of insurance at and from Surinam to Quebec, upon any kind of goods and merchandises, and also upon the body of the ship Providence. The said goods and merchandises, &c., for so much as concerns the assured, by agreement, are valued at £1000, being on profits expected to arise on the cargo of the above ship in the event of her safe arrival at Quebec; and, in case of loss, the insurers agree to pay the same without any other voucher than this policy.

¹ S. C. Park Ins. 854, 6th ed.; Marsh. Ins. 97, 2d ed., shortly reported, and without the arguments of counsel.

The cause was tried before Lord MANSFIELD at Guildhall, when the evidence was, that this ship was laden with molasses; and the plaintiff, having a contract to supply the army with spruce beer, would, if the ship had arrived, have made a profit of £1000 more than the sum insured, and that it was common to insure profits. A verdict was found by the plaintiff, with liberty for the defendant to move for a new trial. A rule having been obtained to show cause why the verdict for the plaintiff should not be set aside, and a new trial granted,

Haworth and Grant showed cause. The statute 19 Geo. 2, c. 37, enacts "that no insurance shall be made on any ship, goods, merchandises, or effects, interest or no interest, or without further proof of interest than the policy." This policy is neither within the words nor the spirit of the Act, nor is it the subject meant by the Act. The Act mentions ship, goods, and merchandises; but this policy is not on any of those things, but on the profits of a voyage. See *Lucena v. Craufurd*, Dom. Proc., 2 Bos. & Pul. N. R. 314, 321. If, indeed, the policy were in fraud of the statute, this argument would not prevail; but here the plaintiff has an interest.

The objection here is not that there is no interest really, or that this is a wagering policy, but that there is a clause in the policy which makes it void within the statute 19 Geo. 2, c. 37; but here the clause immediately follows the valuation, and refers to it. The statute was made against wagering

[*17] policies. In those policies there was no interest, and therefore the statute says that the policy alone shall be no proof of interest. The party is not precluded from showing his interest. On the statute of usury it has been held that, though a bond purports to bear more than legal interest, evidence may be given to show that the transaction is fair. In *Glover v. Black*, B. R., T. 8 G. 3, 3 Burr. 1400, the Court held (though that is not the point of the case) that the statute 19 Geo. 2 did not make any change in the manner of insurances, but that its view was to prevent gaming or wagering policies where the insurer had no interest at all.

The *Attorney-General and Dunning, contra*.—The meaning of the statute 19 Geo. 2, was to prevent persons from making agreements like the one in question. But it is said that this policy is on the profits of a voyage, and that profits are neither goods, merchandises, nor effects, within the statute; but the goods contain and include the profits, which are therefore provided for under the term goods. According to the construction contended for on the other side, it would only be necessary to avoid using the words "goods," &c., and gaming policies might go on as before. It is attempted to show that the words of this policy mean *value*, and not interest. The words are, "the underwriters agree to pay the same without any other voucher than this policy." Unless the policy is to prove the interest, it is to prove nothing. [*Per. Cur.* What are the words of a valued policy?] "Valued at a certain sum, or the sum insured." On such a policy the party always proves interest, and the policy is only considered as ascertaining the value; it dispenses with the proof of the amount of the interest, and not with the proof of any interest at all. Here, on the contrary, the policy dispenses with the proof of any interest at all: that is the case provided against by the statute, and the policy is void.

Lord MANSFIELD.—On argument, and after consideration, I have changed the opinion which I held at the trial, that this policy is void. Before the statute, nothing was so common as a valued policy, and then, at the trial, there was no necessity to prove either value or interest, whether the words "without further proof than the policy" were, or were not, added. See *Craufurd v. Hunter*, R. R., M. 89 G. 3, 8 T. R. 23; *Lucena v. Craufurd*, Dom. Proc. 2 Bos. & Pul. N. R. 321; *Cousins v. Nantes*, Exch. Cham. E.

51 G. 3, 3 Taunt. 523. Then this statute was made; and in *the construction of it, it has been held, whether right or wrong it is now [*18] immaterial to inquire, that a valued policy is not void, but it is sufficient if the party proves some interest. The other side may show that this is a mere evasion of the act; but in general nothing is necessary on a valued policy but to prove some actual interest. In the present case the insurance is made by a contractor for spruce beer on the profits to arise from a cargo of molasses. If the ship arrives the profit is certain. The policy is not meant to conceal the interest, but to get rid of the proof of the *quantum*. I cannot distinguish this from the common case of a valued policy. The words of the statute are very strong, and so they struck me at Guildhall; and if it had been a new question on the validity of a valued policy, doubts might have been entertained; but it is not a new question.

WILLES, Justice.—This is not the case of a wager, nor does the policy pursue the words mentioned in the statute: it is a *bonâ fide* policy, and a real interest. It might be necessary to add more words in this policy than in the common valued policies, because the value of profits is less certain than that of goods. The words may be considered as surplusage, and rejected, so as not to vitiate the policy.

ASHURST, Justice.—I had a doubt at first, but I am now clear that these words are surplusage, and that the case is not to be distinguished from that of a valued policy.

BULLER, Justice.—The words are capable of both constructions, and therefore we must consider the meaning of the parties as it is to be collected from the face of the instrument, and there it appears that they meant to insure a real interest. It is not a necessary construction that *voucher* should mean proof of interest, and if another meaning consistent with the intent of the parties can be given, the Court will adopt such meaning.

Rule discharged.¹

¹ As to the insurance of profits, see *Le Cras v. Hughes*, E. 22 G. 3, post; *Henrickson v. Margetson*, B. R., M. 17 G. 3, 2 East, 550 (n.); *Barclay v. Cousins*, B. R., T. 42 G. 3, 2 East, 544; *Hodgson v. Glover*, B. R., E. 45 G. 3, 6 East, 816; *Lucena v. Craufurd*, Exch. Ch., H. 42 G. 3, 8 Bos. & Pul. 75; *Dom. Proc.*, 2 Bos. & Pul. N. R. 269, S. C.; *King v. Glover*, C. B., T. 46 G. 3, 2 Bos. & Pul. N. R. 206; *Eyre v. Glover*, B. R., M. 53 G. 3, 16 East, 218; 8 Campb. 278, S. C. Where not only the profits are an expectation, but the obtaining a cargo, *out of which the commission constituting the profits is to arise, is also an expectation, the interest [*19] is not an insurable interest within the 19 G. 2, c. 37. *Knox v. Wood*, M. Sitt. at Guildhall, 1808, cor. Lord ELLENBOROUGH, Park, Ins. 356, 6th ed.

JOHN WALKER, Assignee of JOHN CLARE, v. ORADIAH REEVE,
Assignee of JOHN COBLEY.¹ Nov. 16.

The assignee of a lease for years, who has assigned over, is discharged from the covenant to pay rent, before the entry of his assignee.

COVENANT.—The declaration stated that, by indenture of 17th December, 1777, John Clare covenanted, promised, and agreed, to and with John Cobley (in consideration of the charge and expense which the said John Cobley would be at in erecting, on the piece of ground thereafter mentioned, such number of messuages, &c., and in such manner, as Sir Joseph

¹ S. C. imperfectly reported, ante, vol. ii. p. 462.

Mawbey should think proper, and in consideration of the yearly rents, covenants, and agreements, thereafter reserved and contained), that he, the said John Clare, in case such number of messuages, &c., were so built to the good liking of the said Sir Joseph Mawbey; and he, the said Sir Joseph Mawbey, should grant him, the said John Clare, a lease thereof, should and would, within one month after such lease should be so granted, demise, lease, and to farm let, unto the said John Cobley, his, &c., all that piece or parcel of ground situate, &c., and also such messuages, &c., so to be erected on the said piece of ground thereby agreed to be demised, within one month after the said Sir Joseph Mawbey should have granted him, the said John Clare, a lease thereof, but not sooner; to hold the said piece of ground, messuages, &c., unto the said John Cobley, his, &c., from the feast-day of St. John the Baptist, 1775, for the term of sixty years, or sixty-one years, if the said houses so to be built should be to the good liking of the said Sir Joseph Mawbey and John Clare, or one of them, and if he, the said Sir Joseph, should grant him, the said John Clare, a lease thereof, but not otherwise; he, the said John Cobley, nevertheless, in the mean time, and until such lease should be so granted, yielding and paying for the same unto the said

[*20] John Clare, his, &c., a yearly rent of a pepper-corn *for the first three years of the said term, and for the remaining fifty-seven years of the said term the yearly rent of £21, payable quarterly; the first quarterly payment to be made at Christmas then next ensuing. And the said John Cobley (in consideration of such covenant and agreement of the said John Clare for granting a lease of the said piece of ground, &c., so soon, or within one month after the said Sir Joseph Mawbey should grant him a lease thereof, but subject to such objection of the said Sir Joseph, or John Clare, as aforesaid) did covenant, promise, and agree, to and with the said John Clare, that he, the said John Cobley, his, &c., should and would, yearly, during the last fifty-seven years of the said term thereby granted, pay to the said John Clare, his, &c., the clear yearly rent of £21, according to the reservation aforesaid, *prout*, &c.

That the said John Clare, at the making of the said indenture, was possessed of and in the said demised ground, &c., for the remainder of a certain long term of years, whereof more than the said term mentioned in the said indenture was then to come and unexpired; and that the said John Cobley entered and was possessed.

That the said John Cobley being so possessed, and the reversion, as aforesaid, belonging to the said John Clare, he, the said John Clare, by indenture of the 18th June, 1778 (profert of one part), in consideration of five shillings, and other considerations therein specified, assigned to the said John Walker, his, &c., all the estate, right, title, &c., of the said John Clare, of and in the said demised premises, &c., to have and to hold, &c.

That afterwards—viz., on the day and year last above mentioned—the said demised premises, by assignment then and there duly made, came to and vested in the said Obadiah Reeve, by virtue of which the said Obadiah entered and was possessed, the reversion belonging to the said John Walker.

The breach assigned was, that, on the 29th September, 1779, £26 5s., for one year and a quarter's rent, became due.

The defendant pleaded: 1. That the said Sir Joseph Mawbey hath not, at any time hitherto, granted to the said John Clare, or to the said John Walker, or either of them, any lease of the said premises, or any part thereof, with a verification; 2. That before the said £26 5s., or any part thereof, became due (viz., 16th September, 1778), the defendant assigned to one [*21] — Riggs, by virtue whereof the *said — Riggs entered and was possessed thereof, with a verification.

To the first plea the plaintiff demurred; to the second he replied, that the said Obadiah continually, from and after the time when the said demised premises came to him, by assignment, as aforesaid, until, and at, and after, the said 29th of September, 1779, when the said £26 5s. became due, remained and continued in the possession of the said premises, without this, that the said — Riggs, at any time before the said £26 5s. became due as aforesaid, entered into the said premises, and was possessed thereof. Verification.

To this replication the defendant demurred specially, and assigned for cause, that the plaintiff had therein traversed, and attempted to put in issue matter of law only, and not any matter traversable or issuable.

Bower, for the plaintiff.—It is clear that the first plea is bad. The defendant, so long as he continues in possession, is liable to the payment of the rent.

With regard to the replication, the question is, whether the assignee of a lease, who assigns over, does not continue liable to the payment of the rent until another actually enters and takes possession. The point was much considered in *Eaton v. Jacques*, B. R., M. 21, G. 3, *ante*, vol. ii. p. 438; and the only difference between that case and the present is, that in that case the action was against the second assignee. It was laid down in that case, that there are only two ways in which the defendant can be held liable, viz., on privity of contract, or on privity of estate. Here, there is no privity of contract; and to privity of estate enjoyment is necessary. It is admitted by the demurrer, that the defendant remained in the possession of the premises; his assignee cannot therefore be charged on the privity of estate, and the defendant himself consequently continues liable.

Chambre, contra.—The first plea turns upon the construction of the deed, and whether the covenant for the payment of rent is absolute or conditional. To construe it to be an absolute covenant would be absurd, for in that case Copley would have to pay rent without having any term in the premises. The rent is expressed to be payable during the term; so that if no term passes, no rent is payable. If no term passed, it is impossible that the defendant can be charged as assignee; for if nothing passed by the deed (and [*22] it does not profess to demise anything) there cannot be any privity of estate. The first plea, therefore, is good, for it shows that the condition upon which the liability of the covenantor was to arise has never been performed.

With regard to the second demurrer, it is not necessary to controvert the case of *Eaton v. Jacques*. This is an absolute assignment; there the Court proceeded chiefly on the ground that the assignment was by way of mortgage, and intended only a security; the sole argument applicable to an absolute assignment is the form of pleading. But though the form of pleading is in favor of the plaintiff, yet there is no instance of a traverse of the possession, which shows that it is an immaterial allegation; like a request to pay a debt, and many circumstances of time and place. Two cases have occurred in Chancery in which that Court was clear that no entry was necessary to charge an assignee. *Sparks v. Smith*, Canc. M. 1692, 2 Vern. 124, 275; *Pilkington v. Shaller*, Canc. T. 1700, 2 Vern. 374. The interest, which came to the defendant by assignment, passed out of him by the assignment to Riggs. He has only the naked possession left, and no privity of estate. *Saffyn's case*, B. R., E. 3 Jac. 1, 5 Rep. Litt. 5, 289; Co. Litt. 46 b. It is not necessary here to determine the case of a fraudulent assignment; where fraud is relied upon, it must be averred. *Anon.* B. R., T. 30 Car. 2, 1 Vent. 329, 331; *Le Keux v. Nash*, B. R., H. 18 G. 2, 2 Str. 1221. There is no inconvenience to the lessor; he has every remedy that he was entitled to at the time of the making of the lease; he has his remedy against the original lessee and his representatives.

Bower, in reply.—No precise words are necessary to constitute a lease. Here there are all the requisites; an absolute stipulation for a lease for sixty years, and an averment in the declaration, that, at the time of the demise, the lessor had a longer term than that which he demised. The distinction taken between this case and that of *Eaton v. Jacques* does not exist. As soon as a mortgage becomes absolute, a court of law can take no notice of an [*23] equity of redemption. If *Eaton v. Jacques* be law, there must be *judgment for the plaintiff. It is true, that an assignee, for many purposes, is in before possession, but not for the payment of rent. The case from *Ventris* shows that a replication like the present may be supported.

Cur. adv. vult.

Lord MANSFIELD now delivered the opinion of the Court.—After stating the pleadings, he said: The first question is, whether there is any lease at all, or any rent payable; and upon that there may be some doubt; therefore we shall say nothing upon it, as being unnecessary to the judgment we are about to give. But, taking it for granted that the defendant is assignee of the lease, the second plea is, that before any rent became due he assigned the premises to one Riggs, who entered, and was possessed. The replication states, that the defendant is, and continues in possession, and denies that Riggs ever entered, or was possessed; and there is a demurrer to this replication. We are all of opinion, that the averment of the assignor continuing possessed, and the denial of Riggs's entry and possession, are not good unless the replication had gone further, and averred fraud: that might have been sufficient, for fraud vitiates everything. See *Taylor v. Shum*, C. B., E. 37 G. 3, 1 B. & P. 21. Unless fraud be averred, the assignment gives the assignee a title and a possessory right. With regard to the actual possession, it depends upon the nature of the property whether it can take place: the property may be waste, which seems to be the case here. It does not resemble the case of a mortgagee, for there, from the nature of the transaction, it is not an assignment for this purpose. Until the mortgagee calls for the possession, it remains with the mortgagor, and it is understood by both that the mortgagee shall not be liable for the rent.¹ To have determined otherwise would only have been to have driven the mortgagee elsewhere for relief. For these reasons we are all of opinion against the replication, and that there must be

Judgment for the defendant.

¹ But in *Williams v. Bosanquet*, C. B., E. 59 G. 3, 1 B. & B. 288; 3 B. Moore, 500, S. C. it was held, contrary to *Eaton v. Jacques*, that where a party takes an assignment of a lease, by way of mortgage, as a security for money lent, the whole interest passes to him, and he becomes liable, on the covenant, for payment of rent, though he has never occupied, or become possessed in fact.

[*24] **REX v. Inhabitants of WESTMEON.* Nov. 17.

(Reported, Caldecott, 129.)

*BENFIELD v. PETRIE.*¹ Nov. 17.

Where a true bill for perjury has been found against two of several witnesses, upon whose evidence a verdict has been obtained, the Court refused to grant a new trial. Before a new trial can be granted, a probable ground must be laid to show that the verdict was obtained by perjury.

¹ S. C. cited *Tidd's Pr.* 938, 8th ed. *Petrie's Cricklade case*, 265.

THIS was an action of debt on the statute against bribery, for bribery at the Cricklade election, tried before BULLER, J. A verdict having been found for the plaintiff, a rule to show cause why there should not be a new trial had been obtained on an affidavit of the defendant, which stated, that two of the plaintiff's witnesses at the trial, whose names were Wilks and Skilling, had been indicted for perjury in this cause, on the evidences of several persons (not naming them), and that true bills had been found.

Wallace, A. G., Morris, and Batt, showed cause.—They contended, that before a new trial could be granted, the witness must not only be indicted, but convicted of the perjury; and that a new trial could not be granted on this ground unless the only witness, or all the witnesses, if more than one, were convicted. At all events, it ought to have been shown to the Court in what the perjury consisted, as it may have been in some very immaterial point, which could not have affected the verdict. It should also have been stated upon whose evidence the indictment was found; for it does not appear that they were not present, or might not have been examined at the trial, or, indeed, that they were not actually examined, and their testimony discredited. They cited a case of *Atherton v. James*, and others, M. 14 G. 3; where a motion was made to stay proceedings, till the event of an indictment, which had been found against the only witness on the side of the verdict, for perjury at the trial, should be determined, when the Court refused a rule to show cause.

Dunning, and Rooke, S., contra.—The object of this application is to keep alive the verdict till the defendant shall be able, by conviction for the perjury, to set it wholly aside. *It is not law, as stated on the other side, that it is not sufficient, in order to set aside the verdict, to [*25] convict one witness out of many; for as the Court cannot determine on whose evidence the jury found their verdict, the conviction of any one is a sufficient ground for a new trial. This is an application to the Court made upon affidavits, yet the other side are not able to produce a single person to support, by affidavit, the testimony of the witnesses who have been indicted. It is objected, that the finding of the bills is on an *ex parte* examination; but it is the only means at present in the defendant's power of proving the perjury. The witnesses indicted were the only witnesses who proved absolute directions by the defendant to bribe, or an adoption by him of the bribery afterwards; they therefore stand here as the only witnesses upon whose testimony the verdict proceeded; for general evidence of agency is not sufficient to support a conviction for bribery. There must be special directions to bribe, or a recognition of the act of bribery afterwards. With regard to *Atherton v. James*, there might be particular circumstances in that case to induce the Court to refuse the rule, as if the cause had been tried at the sittings two or three days only before the application, and the Judge who tried the cause was convinced either that the evidence of the witnesses was immaterial, or that it was true beyond a doubt. [The Court asked for a copy of the indictment against these witnesses, but the plaintiff's counsel said that the clerk of the peace had refused them a sight of it, and it was not produced by the other side.]

Lord MANSFIELD.—This is an action for bribery. All the facts given in evidence go on the ground that two persons were agents, and that the bribery was committed by them. Evidence of these facts were given by seven or eight persons besides the parties indicted, and both the persons who bribed were examined, for the defendant, at the trial. The jury found a verdict for the plaintiff against the evidence of these two persons, on grounds which impeach that evidence. The Judge who tried the cause is satisfied with the verdict, and therefore it stands as a verdict with the weight of evidence in

its favor. The motion for a new trial rests solely on the ground, that two of the witnesses have been indicted for perjury. It is not an established rule, that it is of course to stay a verdict because the witnesses in support of that verdict *have been indicted for perjury. *R. v. Heydon*, B. R., E. 3 [*26] G. 3, 1 Black. 404. We are not told what the perjury assigned is, nor who are the witnesses in support of the indictment, and yet the defendant might have furnished the Court with this information. In order to obtain this rule, a probable ground must be laid before us, to show that the verdict was obtained by perjury. If general agency is proved, it is sufficient evidence to be left to a jury without proof of a command given by the principal to bribe, or a recognition of the particular fact of bribery by him afterwards.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—I am of the same opinion. I left it to the jury on the evidence of general agency. It was for the jury to judge whether the fact came within the authority of the agent.

Rule discharged.

MACPHERSON *v.* PETRIE. *Nov.* 21.¹

Motion for new trial on the ground of perjury.

THIS was a motion for a new trial in a like cause and on a like ground, as the above case of *Benfield v. Petrie*. In this cause the verdict went on the evidence of one Trueman as to a particular fact, and of Skilling as to general agency.

LORD MANSFIELD.—There is no sufficient ground to vary from the rule laid down in the last case. All the objections to the evidence of Trueman were open to the jury on the trial. It is said that the plaintiff might have had the copy of the indictment here; but the answer is, that it is incumbent on the defendant to produce everything in support of his own application.

Rule discharged.

There were several other cases which stood on the same ground, and shared the same fate as the above two, without further argument.

¹ This and the following cases are given out of their order in point of time, as they relate to the preceding case.

[*27]

*PETRIE *v.* MILLES.

Motion for new trial on the ground of perjury, or to stay proceedings.

THIS was an application of the same nature, arising out of the same transactions, but the motion in this case was made not only on the ground of indictments for perjury found, but also on the ground of surprise in going to trial, and that one of the witnesses for the plaintiff, who had been indicted, was a person not to be believed; to which several affidavits were produced. A rule to show cause having been granted,

Dunning showed cause.—He produced affidavits of steps having been regularly taken in the cause, so that there could have been no surprise; also

affidavits to support the credit of the impeached witness, and other affidavits to discredit the persons who had made affidavits in support of the rule.

Batt and Erskine having been heard in support of the rule,

Lord MANSFIELD said.—This application is made on three grounds: 1. That the defendant's attorney ill-used him, and neglected his cause, and that from the beginning the defendant knew nothing of the proceedings but the writ; 2. That had he known of the proceedings he could have overthrown the testimony of the witness against him; and 3. If those grounds fail, the application is to stay the proceedings till after the trial of the indictment for perjury. As to the first ground, this motion is made through the intervention of another attorney, which is very proper if the former attorney neglected his duty; but it is admitted by the counsel at the bar that he did instruct them at the trial; therefore the defendant comes with a falsehood at the outset. Secondly, he says, if he had been apprised, he could have answered the plaintiff's case at the trial, for he has two witnesses who might have been produced; but it is not stated who those witnesses are, nor what they could have proved, nor is there any affidavit by them. Lastly, the defendant says that an indictment for perjury has been found against the witness for the plaintiff. This is another instance of the mischief which would ensue if proceedings were to be stayed in consequence of the finding of a bill for perjury. The bill is found entirely on *ex parte* evidence, and is no proof that the charge is true. Neither the nature of the [*28] *perjury nor the names of the witnesses who are to support the indictment, are stated, but it appears that the defendant himself is one of those witnesses. The first instance in which an application of this kind was successful was in the case of the pagodas.¹ *Fabrilius v. Cock*, B. R., M. 6 G. 3, 3 Burr. 1771. It was a clear and certain perjury, and suspected by the Court at the trial, and the witness ran away.

These are all the grounds of the application. It seems a most audacious one, and the rule ought to be discharged with costs.

Rule discharged with costs.

¹The rule with regard to these applications is thus laid down by Mr. Tidd: "If the witnesses on whose testimony the verdict was obtained have been since convicted of perjury in giving their evidence, the Courts will grant a new trial; or, if a probable ground be laid to induce the Court to believe that the witnesses are perjured, they will stay the proceedings on the finding of a bill of indictment against them for perjury till the indictment is tried. The Court of Common Pleas in one case granted a new trial where the testimony of witnesses, on which a verdict had proceeded, was founded on, and derived its credit from, particular circumstances, and those circumstances were afterwards clearly falsified by affidavit. But in general the finding of a bill of indictment for perjury is no ground for staying the proceedings before conviction, it being found on *ex parte* evidence; and the Court will not grant a new trial on the mere affidavit of one party contradicting the witnesses on the other side.

See *Aysheford v. Charlotte*, H. 25 G. 3, post; *Warwick v. Bruce*, B. R., E. 55 G. 3, 4 M. & S. 140; *Attorney-General v. Woodhead*, Exch., M. 56 G. 3, 2 Price, 3; *Feise v. Parkinson*, C. B., M. 53 G. 3, 4 Taunt. 640; *Harrison v. Harrison*, Exch., H. 1 & 2 G. 4, 9 Price, 89; *Thurtell v. Beaumont*, C. B., M. 4 G. 4, 1 Bingh. 340; 8 B. Moore, 612, S. C.

DAVISON v. MURE and others. Nov. 20.

Covenant on a charter-party, whereby, if the ship should be lost, burnt, or taken, and it should appear to a court-martial that the master, &c., had made the best defence they could, the freighter covenanted to pay the value of the ship. The holding of a court-martial is a condition precedent.

THIS was an action of covenant on a charter-party, by which the plaintiff

had let to freight to the defendants, who were contractors with government for providing transports for stores, a certain vessel. The charter-party contained [*29] a clause, that if the ship should be lost, burnt, or taken, and *it should appear to a court-martial that the master, &c., had made the best defence they could, then the defendants covenanted to pay the value of the ship. The declaration stated, that the ship, after taking in stores in Ireland, sailed under convoy, and during the voyage was taken by the Americans; that the master, &c., made the best defence they could, and so it would have appeared to a court-martial if the defendants had procured one to be held.

To this declaration the defendants pleaded, 1. That the ship was not taken in a hostile manner; 2. That the master, &c., did not make the best defence; 3. That it would not have appeared to a court-martial that the best defence was made; 4. That it has not appeared to a court-martial that the best defence was made. On the three first pleas issue was joined, and a verdict was found for the plaintiff. To the fourth plea the plaintiff demurred, and the defendants joined in demurrer.

Davenport, for the plaintiff, in support of the demurrer.—The sitting of a court-martial is not a condition precedent to the plaintiff's recovery. It was not in his power to procure a court-martial; both the captain and the mariners are prisoners in America. A jury can judge as well as a court-martial; and in insurance cases they every day try such questions.

Wood, for the defendants, informed the Court that inquiry had been made at the Admiralty, and the answer was, that during the last war there were several instances of courts-martial sitting to inquire into losses in the transport service, but that none had occurred during the present war. He was then stopped by the Court.

LORD MANSFIELD.—The charter-party annexes a condition to the payment of the money for the ship in case of capture, &c.,—viz., that it shall appear to a court-martial that the utmost defence was made. In order, therefore, to obtain the money, the plaintiff must show that the condition has been performed, or that it was by the defendant's fault that it has not been performed. This he has not done. There must therefore be

Judgment for the defendants.¹

¹ See 1 Saund. 320 b, 2 Saund. 107 b, 852 (n.), 5th ed.

[*30]

*KIRKPATRICK v. KELLY.¹ Nov. 20.

A man arrested within the verge of the Court is not entitled to be discharged, an arrest in a franchise being only a breach of the privilege of the lord of the franchise.

RULE to show cause why the defendant should not be discharged out of custody on the ground that he had been illegally arrested. It appeared that a person who had got possession of an abandoned peace-warrant from a man who was in possession of it, took the defendant upon it within the verge of the Court, and carried him before a magistrate, who discharged him; and while the defendant was returning from before the magistrate, he was arrested, being out of the verge of the Court, on civil process, at the suit of the plaintiff, by the person who had procured the peace-warrant.

Wallace, A. G., and *Haworth*, showed cause, and *Dunning* was heard in support of the rule.

¹ S. C., cited 3 T. R. 740.

LORD MANSFIELD.—I take it to be a settled rule, that where a man indirectly, and by trick, does that which it would have been illegal for him to have done directly, he shall be considered as having done it directly. The question, therefore, comes to this: whether, if this arrest had been made directly within the verge of the Court, it would have been illegal, so as to have entitled the defendant to be discharged. As at present advised, I think that, though the arrest is illegal as respects a third person,—viz., the owner of the franchise,—yet that it is not so as it respects the person arrested, nor can he maintain an action for false imprisonment. It is different from the case of breaking open a house under a peace-warrant, and then arresting a party, because that is prohibited by positive law. The Court will not interfere in a summary way unless compelled to do so by authorities, especially in a case where the merits seem to be against the defendant.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—I am of the same opinion. An arrest by breaking open the door of a house is void, because it is against positive law; but an arrest in a franchise is only a breach of the privilege.

Rule discharged.*

¹ See *B. v. Stobbs*, B. R., T. 30 G. 3, 8 T. R. 785; *Sparks v. Spink*, C. B., H. 57 Geo. 3, 7 Taunt. 311; *Piggott v. Wilkes*, B. R., E. 1 Geo. 4, 3 B. & A. 502; 1 Chitty Rep. 375 (n.); *Tidd's Pr.* 217, 8th ed.

*HODGKINSON v. FLETCHER and others. Nov. 22. [*31]

Trespass for breaking and entering close and digging coals. Plea, that close was part of fee-farm lands of R.; that (10 Jac. 1) the mines under those lands were granted, &c., and derives title under the grant, and justifies. Replication, that no right of entry accrued within twenty years of the trespass. Issue thereon. Evidence that the grantees had dug, within twenty years, under other fee-farm lands in R., but no evidence of digging under the plaintiff's. Evidence, also, that plaintiff, or his predecessors, had not dug. Held, that the defendants were not barred.

TRESPASS for breaking and entering the plaintiff's closes and digging coals.—Plea, that those closes (10 Jac. 1) were part of the fee-farms of the Crown; that one B. was seised of all the mines, &c., under the fee-farm lands of the Crown, in Ripley, who granted them to A. B., and so deduces a title to one Hunter, under whom the defendants claim, and justify digging for coals, &c.—Replication, that no right of entry accrued to Hunter, or those under whom the defendants claim, within twenty years before the trespass committed.—Rejoinder, that a right did accrue within twenty years before the trespass committed.

On the trial, at Derby, before GOULD, J., the evidence was, that the defendants, or those under whom they claimed, had regularly, from the time of the grant to this time, dug for coals under other of the fee-farm lands in Ripley; in some quietly, in others with a contest, in which they succeeded; but no positive evidence was given of their having ever worked under the fee-farm lands of the plaintiff till the time when, &c.; but it appeared that neither the plaintiff nor his predecessors had ever dug under the lands. A verdict was found for the defendants; and a rule having been obtained to show cause why there should not be a new trial, the Court called upon the counsel for the plaintiff to support the rule.

Hill, Sergeant, Wilson, and Wood, in support of the rule.—The question is, whether the defendants' right to dig in the plaintiff's land is not barred by their not having exercised it for twenty years. The proof of the issue

lay upon the defendants, being in the affirmative, and they did not prove any exercise of the right within that period. A right to enter for the purpose of digging for coals or minerals is as much subject to the operation of the statutes of limitation as a right to enter upon the soil. *Rich, dem. Lord Cullen v. Johnson*, B. R., M. 14 G. 2, 2 Str. 1142. It is necessary, in order to keep up such a right, to do some act, as of working the mine once in twenty years. Suppose that Hunter had been the lessor of the plaintiff [*32] in ejectment, or demandant in a real action for these *mines: he must have shown a right of entry within twenty years, or a seisin within the proper period of limitation. So, to support this plea, a possessory title must be established. It does not resemble the case where the owner of the soil is likewise the owner of the mines under the soil. *Lead Company v. Richardson*, B. R., M. 3 Geo. 3, 3 Burr. 1341.

The answer attempted to be given will be, that the defendants have exercised the right in other parts of the fee-farm lands; but the digging in the lands of other persons can be no evidence against the plaintiff. *Primâ facie*, the owner of the land is owner of the mines also, which pass by a grant of the land. Co. Litt. 4. To rebut this presumption stronger evidence is required than was given in this case. If that evidence be sufficient, a man would have nothing to do but to have large words inserted in his grant, and then to dig in parts where he had a right; this would then be evidence against other owners, and evidence which they could never repel.

There is also another objection. The plea, in setting out the grant, makes use of the words "mines, delfs, and pits of coal," which extend only to such mines as are open, and give no liberty of opening fresh mines. *Astry v. Ballard*, B. R., H. 28 & 29 Car. 2, 2 Mod. 193. In such grants, in order to authorize the opening of fresh mines, the word "digging" is usually inserted. [Per Cur. In *Astry v. Ballard*, were not the mines open? They were. Per Cur. That, then, is a different case; for here the defendants are entitled to the mines, whether opened or unopened.]

Lord MANSFIELD (without hearing the other side).—It appeared that in 10 Jac. 1 there was a grant of the right of mines under the fee-farm lands in Ripley. The plaintiff's lands are part of those fee-farm lands, and he pays a proportion of a fee-farm rent. The defendants claim as coal-masters under the original grantee. The plaintiff has put the whole question upon this issue: that whatever may have been the original right, it is now barred by the statute of limitations. I agree with the counsel for the plaintiff, that if the defendants would be barred in an ejectment, they would be barred on this issue upon these pleadings.

[*33] It was proved that the defendants have regularly, from *the time of the grant up to this time, dug under the other fee-farm lands in Ripley, in some quietly, in others with a contest, in which they succeeded; but no positive evidence is given that they ever worked under the plaintiff's lands till the cause of action. See *Stanley v. White*, B. R., 14 East, 332; *Tyrwhitt v. Wynne*, B. R., E. 59 G. 3, 2 B. & A. 554; *Hollis v. Goldfinch*, B. R., H. 3 & 4 G. 4, 2 Dowl. & Ry. 316; S. C. 1 B. & C. 205; *Rowe v. Brenton*, B. R., M. 9 G. 4, 8 B. & C. 758. It appeared also that the plaintiff, or his predecessors, had never dug under his lands. These were all the facts proved.

Independently of the law of limitations, there arises a presumption of right in favor of possession, where that possession is adverse to the right claimed. Even in the case of the Crown there is such a presumption in favor of possession. But, to support an argument of this nature, the possession must be notoriously adverse to the claim set up; it must not be a possession consistent with the claim. Thus, the possession of a lessee, of a joint tenant, or

of a tenant in common, shall not bar, because it is consistent with the claimant's title; see *Fishar v. Prosser*, B. R., M. 15 G. 3, Cowper, 218; *Fairclaim*, dem. *Empson v. Shackleton*, B. R., E. 10 G. 3, 2 W. Blackst. 690; so, a fine levied by a tenant for life does not begin to run till the particular estate has expired, *Fermor's case*, B. R., H. 44 Eliz., 3 Rep. 78 b.

Here, the grantees have never abandoned their right; but, on the contrary, have been continually exercising it. They are not bound to be constantly working in every place. It is the nature of the right to be exercised by degrees, and to go on for ages. The grantees must be governed in the exercise of the right by the circumstances which occur, by the course of the veins, &c. It is a material fact, that neither the plaintiff nor his predecessors have ever exercised the right themselves. Had the mines been worked by them, the case would have been different. But his possession of the land is not a possession adverse to, or inconsistent with, the claim of the defendants, who have had a notorious possession, under the lease, by working the other pits.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—The rule, as to adverse possession, laid down by my Lord, may be found in the case of *Reading v. Royston*, B. R., H. 1 Anne, Salk. 423. The *prima facie* evidence of title to the *mines, which the possession of the land affords, is in this case rebutted by the [*34] grant. Since the grant, the mines have never gone with the land. Even if none of the pits in Ripley had been worked for upwards of twenty years, I do not think that the defendants would have been barred; for, in order to bar them, there must be an adverse possession in some one else, of which no evidence was given. [The *Attorney-General* said, that in Northumberland it was usual for the coal-masters to buy up old grants, which had never been used for 100 years, for the sole purpose of preventing their being worked, which had always been the object of the successive proprietors.]

Rule discharged.

REX v. FISHER, and REX v. TOWILL. Nov. 24.

(Reported, CALDECOTT, 185.)

REX v. INHABITANTS OF NORTH CURRY. Nov. 24.

(Reported, CALDECOTT, 187.)

GALLANT and Another v. BOUTEFLOWER. Nov. 26.

'Counts on promises to a testator may be joined with counts on promises to the executor, and in answer to a set-off the executor may give in evidence money paid by him as executor.

THIS was an action by an executor against an attorney who had recovered a sum of money due to the testator, in an action brought by the plaintiff, as executor, with costs. The declaration in the present action contained four counts: 1. A count for money had and received by the defendant to the use of the testator; 2. A count on an account stated with the testator; 3. A count for money had and received by the defendant to the use of the plaintiffs, as executors; and, 4. A count on an account stated with the plaintiffs

as executors. The defendant gave in evidence a set-off, which exceeded the amount of the debt and costs recovered in the former action. This set-off was answered by evidence of two small sums of money advanced, at different times, by *the plaintiffs to the defendant, which turned the balance [*35] in favor of the plaintiffs against the defendant. It was objected, at the trial, that these sums were not paid by the plaintiffs as executors, and could not therefore be given in evidence, under a declaration, by the plaintiffs as executors. A verdict was found for the plaintiffs, with leave for the defendant to move to set it aside and enter a nonsuit.

Wallace, A. G., and Rous, showed cause, and cited *Hookin v. Quilter*, B. R., T. 21 G. 2, 2 Str. 1271; *Wils.* 171, S. C.; and *Smith v. Norfolk*, B. R., M. 1 Car. 1, Cro. Car. 225.

Dunning, contra, cited *Eddower v. Hopkins*, B. R., E. 20 G. 3, ante, vol. i. p. 376.

LORD MANSFIELD.—The objection was, that by declaring as executor, the plaintiff would avoid a set-off and costs. The answer is, that if, in fact, he is suing in his own right, he would not be excused from costs; Accord. *Bolland v. Spencer*, B. R., T. 37 G. 3, 7 T. R. 358; *Tattersall v. Grootte*, C. B., T. 40 G. 3, 2 Bos. & Pul. 256; *Jones v. Jones*, C. B., E. 4 G. 4, 1 Bingh. 249; nor protected from a set-off. It struck me, that in the present case the declaration must be right, because it was according to the truth of the case. The defendant was employed to recover a debt with costs. That suit was brought by the plaintiffs, as executors, and the money they advanced was money advanced in that character. I am now stronger in that opinion. The case in *Strange* was on a judgment by default. I think that here a general verdict on all the counts would be good.

ASHBURST, Justice.—An executor, by naming himself as such when he need not, shall not be thereby excused from costs. The exemption is on the ground that he is not perfectly acquainted with the testator's transactions; Accord. per LAWRENCE, J., *Cowell v. Watts*, B. R., E. 45 G. 3, 6 East, 412; but a transaction in his own time he must know. I am not acquainted with any case where, if the money to be recovered will be assets, the parties may not declare as executors. In some cases a man must declare an executor, in others he may or may not, at his election. Whether he will be liable to costs or not, is a question which has often been agitated, but I never heard of an objection like this to the form of the action.

[*36] BULLER, Justice.—Where the cause of action accrues in *the lifetime of the testator, the executor must sue as such; where it accrues after his death, the executor may sue as such, or not; and in these cases the Court will not excuse him from costs. Where the sum recovered will be assets, I think he may always declare as executor. It never was an objection that there were counts on promises to the testator, and counts on promises to the executor, in the same declaration.¹ The two smaller sums which were given in evidence in answer to the set-off, were demandable by the plaintiffs as executors.

Rule discharged.

¹The general rule, now well established, is, that where the money to be recovered would be assets, the counts may be joined. See *Ord v. Fenwick*, B. R., M. 43 G. 3, 3 East, 104; *Partridge v. Court Exch.*, H. 58 G. 3, 5 Price, 412; 7 Price, 591, S. C.; *Clark v. Hougham*, B. R., T. 4 G. 4, 3 Dowl. & Ry. 322; S. C. 2 B. & C. 149; 2 Saund. 117 d (n.), 5th ed. As to the rule in case of executors defendants, see *Ashby v. Ashby*, B. R., M. 8 G. 4, 1 Man. & Ry. 180; S. C. 7 B. & C. 444.

The KING v. TEMPERANCE GREEN, otherwise SHREIBER, and Others. Nov. 28.

The Court will grant a rule nisi for an information for a conspiracy in taking away from his father's house a young man of fortune under age, for the purpose of marrying him to one of the conspirators, though the young man is not heir-apparent to his father.

MORGAN moved for a rule to show cause why an information should not be filed against Mrs. Temperance Green, otherwise Shreiber, Mrs. Wildman, Jane Barchas, Robert Atkyns, Mary Thomasin, and the Reverend Mr. Stevens, for a conspiracy, since carried into execution, to take away from his father's house young Mr. Shreiber, an infant of the age of seventeen years, who was entitled to a large fortune when he came of age, and to marry him, in Scotland, to a Mrs. Green (one of the defendants), a widow, of small fortune, of the age of thirty-five. The motion was made at the instance of Mr. Shreiber, the father of the young man.

The Court, when it was first moved, made some difficulty in granting the rule to show cause, owing to its not being the eldest son and heir that was taken away; and directed the motion to stand over till the cases had been looked into, where either informations had been granted, or indictments had *been held to lie, for taking away a child who was not an heir. [*37]

Some days afterwards, Lord MANSFIELD said, that they had looked into the cases, which were many, both old and modern, and that they had no difficulty in granting the rule to show cause, and he particularly directed Morgan to look into the case of the King v. Lord Ossulston and Others, B. R., H. 12 G. 3, 2 Str. 1107.

The matter was however soon afterwards made up between Mr. Shreiber and his son and daughter, and never came again before the Court.

Lord MANSFIELD, in this case, directed a search to be made in the Crown Office for informations on this subject, in consequence of which the following list was obtained. Only one of the informations was framed on the statute 4 & 5 P. & M. c. 8.

Trinity, 14 & 15 Geo. 2. Somersetshire. Rex v. Francis Molloy. Information granted against the defendant for taking away Mary Norman, a virgin, and unmarried, between seventeen and eighteen years of age. That A. B., C. D., E. F., and G. H. had, by lawful means, the order and governance of one Mary Norman, the daughter of J. Norman, and by consent of J. Norman placed her under the care of one J. Staggs, a schoolmaster, to be educated; that she was entitled to a considerable fortune of £3000 and upwards, personal estate; that defendants, in the night-time, unlawfully entered the house of the said J. Staggs, and carried her away with intent to marry her.

Hilary, 15 Geo. 2, 1741. Kent. Rex v. Cornforth and Others, B. R., H. 15 G. 2, 2 Str. 1162. Information granted against the defendants for a conspiracy in taking away one Mary Boone, spinster, then a maid, and unmarried, and under sixteen years of age, an illegitimate daughter of T. Boone, with intent to marry her.

London. Another information against the same Cornforth for procuring a license to marry by a false oath.

Easter, 4 Jac. 2. Rex v. Atkyns and Others. Information against the defendants for forcing a man *non compos mentis* out of the custody of his guardian, and to marry one of the defendants.

[*38] Hilary, 7 Geo. 3, 1767. Middlesex. *Rex v. Charles *Sweet*. Information granted for seducing and taking away Mary Sampey, only child and heir-apparent of John Sampey, of the age of fourteen years, and marrying her in Guernsey.

Hilary, 12 Geo. 2. Sussex. *Rex v. Lord Ossulston and Others*, B. R., H. 12 G. 2, 2 Str. 1107. Information granted for running away with Mary Eades, a virgin, under sixteen years of age, ward to her uncle, T. W. Brereton, Esq., and entitled to a fortune of £8000, and marrying her, 10th December, 11 Geo. 2, to Charles Pearson, one of the conspirators. 1st count on the statute, the rest at common law.

Michaelmas, 24 Car. 2. *Rex v. Storey and Others*, B. R., M. 24 Car. 2, 3 Keble. 101. Information by the coroner and attorney for a riot with intent to take away a virgin without the consent of her mother, Mary Gilborne. Trial at bar, M. 24 Car. 2. Storey fined £100, and to find security for his good behavior for five years. The rest convicted and punished.

Michaelmas, 20 Car. 2. *Rex v. Twisleton and Others*, 1 Lev. 257; 1 Sid. 387, S. C.

Trinity, 14 & 15 Geo. 2. *Rex v. Heary and Others*. The defendants were convicted on an indictment for a conspiracy in carrying away one Henrietta Arnold, aged thirteen, with £3000 fortune.

Trinity, 1 Anne. *Regina v. Blachel and Others*, 7 Mod. 89.

Trinity, 42 Eliz. *Basham v. Dennis*, Cro. Eliz. 770.

WILLES, Justice, mentioned the cases of *Eyre v. Shaftesbury*, 2 P. Wms. 102; and *Goodall v. Harris*, Id. 562; and *ASHURST, J.*, the case of *R. v. Freeman*, M. S., in which *GOULD, J.*, was counsel, when a rule to show cause was granted, but nothing further was done.¹

¹ See statute 9 G. 4, c. 81, s. 10, and the printed report of Wakefield's case, 1827; *R. v. Ward*, B. R., M. 8 G. 3, 1 Blackst. 886; *R. v. Clarke*, B. R., T. 81 G. 2, 1 Burr. 606. As to conspiracies to marry paupers, see *Russel on Crimes*, vol. ii. p. 566, 2d ed.

[*39]

*HARTLEY v. BUGGIN.¹

Insurance on ship at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves. The ship stayed at the coast of Africa several months, and was employed as a receiving ship for slaves, afterwards put on board other ships, which was the employment of a factory ship. Held, that this was a deviation.

THIS was an action on a policy of insurance upon the ship *Blossom*, at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves. The cause was tried at the last assizes at Lancaster, before *HEATH, J.*, and a verdict was found for the plaintiff, with which the learned judge reported himself satisfied.

On a rule obtained to show cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but the question now raised was, whether the plaintiff, by the use he made of the ship on the coast of Africa, and the delay he there occasioned, was not the cause of the loss; that is, whether he did not make such use of her, during her stay on the coast, as amounted to a deviation. It appeared in evidence that this ship stayed on the coast from August to March; that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board

¹ S. C. Park, Ins. 415; but without the arguments of counsel.

other ships and sent to the West Indies; that this is the employment of what they call a factory ship, but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in other vessels; but it did not appear that any slaves, the produce of the Blossom's own cargo, were sent away in other vessels. It appeared, however, that her stay there was seven months beyond the usual stay of ships in that trade.

Wallace, A. G., Lee, Davenport, and Wood, showed cause against the rule for a new trial. They contended that this use of the ship as a factory ship was not inconsistent with the object of the voyage. If the ship does nothing which increases her risk and prolongs her stay, or is inconsistent with the object of her voyage, it is not a deviation. Here she parted with no slave, the produce of her own cargo, which ever was on board of her. Ships can only be supplied in turn, and whilst she is forced to wait there, she may as well receive the slaves of the other ships as not. It is the course of the trade so to do. The definition of a factory ship *is a floating warehouse, not her merely being thatched and covered. [*40]

Arden and Dunning, contra, in support of the rule, were stopped by the Court.

LORD MANSFIELD.—When different points are agitated at a trial, and a great deal of evidence is applied to each, and the counsel go out of a cause, it is not surprising that juries should have their attention distracted from the principal point. The great advantage of a motion for a new trial is, that after the argument on the motion, the cause goes down again winnowed from the chaff of the first trial. The single question in this case is, whether there has not been what is equivalent to a deviation. It is not material, to constitute a deviation, that the risk should be increased. The voyage is to the coast of Africa, and thence to the West Indies, which includes an insurance on the ship while she stays and trades at Africa, and it is with liberty to exchange goods and slaves; but that exchange is for the benefit of the ship, one slave for another. If a ship insured for a trade is turned into a factory ship, or a floating warehouse, the risk is different; it varies the stay, for while she is used as a warehouse no cargo is bought for her.

The law being clear, how is the fact? The captain says the vessel was not used as a factory ship; but his evidence is much impeached. Indeed, he says that he was young in the trade, that he never saw a factory ship but once, and was not in her. He might have a salvo, because this vessel was not thatched, as factory ships usually are; but the question is, was she used as a factory ship? Without being thatched and roofed, she may have been put to that use. The fact is clear: the risk is different, and there must be a new trial.

Rule absolute.¹

This cause was again tried at the Lancaster Summer Assizes, 1782, before **EYRE, B.**, and evidence was given that, since the establishment of agencies on the coast, it had been a custom with the plaintiff's ships to stay till others came, and that it was intended to go to the West Indies just before the accident happened; that the putting the vessel ashore was to prepare her for the voyage; that by agencies the sailing of ships was much expedited; and that she had not stayed an extraordinary time. **EYRE, B.**, told the jury that there was no question of fact; that it was clear the ship was employed as a factory. What the effect of that was afforded great room for argument. One side contended that it was usual and allowable in the

¹ That a voluntary delay will operate as a deviation, see *Smith v. Lurridge*, 1801, coram *Ld. Kenyon*, 4 Esp. N. P. C. 26; *Williams v. Shee*, 1818, coram *Ld. Ellenborough*, 8 Campb. 469.

course of trade; the other side, that it varied the risk materially. New modes of trade were advantageous, and it was not for the interests of commerce to be cramped by underwriters. An assured was to conduct his trade his own way, with this exception, that it does not materially vary the risk insured. Barter, for the facilitation of the voyage, was allowable without express stipulation. The question was, if the use made of the ship had the voyage for its object. The jury found a verdict for the defendant.

SHIRLEY v. WILKINSON.¹

The concealment of letters, stating that the vessel is about to sail early the next month, is a material concealment, and avoids the policy.

THIS was an action on a policy of insurance. A verdict having been found for the plaintiff, a rule to show cause why there should not be a new trial was obtained on the ground that the verdict was against evidence, there having been a material concealment. It appeared in evidence that Davis and Protheroe, the agents who had directed the insurance to be made on the part of the plaintiff, had received a letter, dated 23d of July, from the captain of the vessel insured, on the 28th of October, in which he said, "I have now eighty hogsheads on board, one-half ballast in, and I expect to be ready for sea very early in August." Another letter was also received by them from the captain, in which he said, giving directions for the insurance, "which sails from Morant Bay in all August;" and another letter of the 27th July, in which he said, "Not being able to get ready to sail with this fleet, she is to go in August, and run it." Protheroe was examined as a witness at the trial, and said, "I gave orders to insure. I did not send intelligence of the captain's letters, because, from other letters, I thought he could not sail as soon as he expected." The fleet from Jamaica to England [*42] usually sails by the first of August; and it is material *whether a ship sails before or after that month. The jury, thinking the letters not material, found a verdict for the plaintiff.

Wallace, A. G., *Dunning*, and *Wilson*, now showed cause. These letters contained nothing material; they were merely the captain's opinion, which Protheroe, from the circumstances, thought not well founded. In truth, nothing was kept from the underwriters but what would have lessened the risk rather than have increased it.

Lee and *Howorth*, contra.—The question is not how Protheroe understood the matter, but whether he ought not to have laid everything he knew on the subject before the underwriters, and have enabled them to form their own judgment on it. In all cases of insurance, an underwriter has a right to have all the information laid before him that the insurer himself possesses.

Lord MANSFIELD.—I certainly thought, on the trial, that this matter was material to be communicated to the underwriters. The premium depended on the time the ship sailed. If she sailed at a particular time, she was a missing ship, otherwise not. The broker is asked by the underwriters, what is his intelligence? He only says, "She does not come with the fleet." What intelligence had he? The letters of the captain. Of these letters nothing was communicated but that the ship did not sail with the fleet, which sails on the first of August. The material point was that she would be ready for sea very early in August. I think this letter of the captain's very material, and that it should have been communicated.

The rest of the Court being of the same opinion, Rule discharged.*

¹ Note of S. C., ante, vol. i. p. 306 (n).

² This case appears to be at variance with those of *Fort v. Lee*, C. B., H. 51 G. 8, 3 Taunt. 881; and *Forley v. Moline*, C. B., E. 54 G. 8, 5 Taunt. 480; 1 Marsh. 117,

S. C. See also *Court v. Martineau*, M. 23 G. 3, post, and the note there. In *Bridges v. Hunter*, B. R., H. 53 G. 3, 1 M. & S. 19, *Le Blanc*, J., says, "I believe it has always been considered that the time of the ship's sailing, if known to the assured, is a material fact to be communicated to the underwriter." See also *Willes v. Glover*, C. B., E. 44 G. 3, 1 Bos. & Pul. N. R. 14; *Kirby v. Smith*, B. R., T. 58 G. 3, 1 B. & A. 872; *M'Andrew v. Bell*, 1795, coram Ld. Kenyon, 1 Esp. N. P. C. 373; *Webster v. Foster*, 1795, coram Ld. Kenyon, 1 Esp. N. P. C. 407; *Littledale v. Dixon*, C. B., H. 45 G. 3, 1 Bos. & Pul. N. R. 151.

*Lord PAGET v. MILLES.

[*43]

A., being seised of a mill, and having a sole fishery in the waters of the mill, granted the mill, with all waters, streams, &c., necessary in working the same, "except, and always reserving, the right and privilege of fishing in the waters of the said mill." Held, that this was an exception of the sole fishery, and not a reservation of a new easement.

TRESPASS for fishing in the separate fishery of the plaintiff. After verdict for the plaintiff, a rule to show cause why there should not be a new trial was obtained, and the only question made was on the construction of a grant from the plaintiff to the defendant, whether it operated as a grant of the fishery, reserving to the grantor only a right of fishery, or whether it excepted the sole fishery out of the grant. By the deed, Lord Paget granted "the mill, with all waters, streams, &c., necessary for working the mill, and usually held and enjoyed therewith, *except and always reserved to the said Lord Paget, his heirs, &c., the right and privilege of fishing in the waters of the said mill.*" At the time of this grant, Lord Paget had a sole fishery in these waters.

Dunning and Davenport showed cause.—This is not a reservation of a right of fishing, but an exception of the right of fishing, which Lord Paget possessed before, and which was a sole right. It is an exception of what the grantor had before, and did not choose to part with. By the grant, everything necessary to the mill for driving and working it was granted, as well as for confining the water; but the words of the grant, had they stood alone, would not have carried the right of fishery. The exception, however, puts an end to all question.

Wallace, A. G., and Law, contra.—The words of the grant are sufficient to convey the soil of the water and of the ponds; and therefore it is clear that, without the reservation, Lord Paget could have had no title. Where a grant is made, all that the granting words used include will pass by the grant. *Throckmerton v. Tracy*, C. B., 2 & 3 P. & M., *Plowden*, 151. By the reservation, nothing more than the easement of fishing in the waters is reserved. The words of the reservation are the words of the grantor, and shall be taken most strongly against him. *Co. Litt.* 197; *Plowd.* 171; 1 *Saund.* 137. Those words will be fully satisfied by holding that an easement is reserved.

Lord MANSFIELD.—If there are words in the English language which will not admit of a doubt, they are these *words. Lord Paget had water for a mill, and he had a sole fishery, and he grants the mill, with the [*44] water for the mill, reserving the fishery; and the question is, whether the whole right of fishing is reserved, or whether a new right is created by it. The words are, "*the right and privilege of fishing.*" Rule discharged.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Hilary Term,

IN THE

TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.

The KING *v.* Inhabitants of the Holy Trinity in WAREHAM.

Jan. 26.

(Reported, CALDECOTT, 141.)

WALPOLE *v.* ALEXANDER.¹ Feb. 1.

A witness coming from abroad to give evidence in a cause here, without being served with a subpoena, is privileged from arrest.

THE defendant obtained a rule to show cause why he should not be discharged out of custody on filing common bail. The application was made on three grounds; 1. That he had come from France as a witness in a cause of *Simond v. Hankey*, to be tried at the sittings; 2. That he had been discharged by a commission of bankrupt subsequent to the debt for which he was arrested; and 3. That a suit was depending in France respecting the same subject-matter.

The *Attorney-General* and *Cowper* showed cause.—As to the privilege of the defendant as a witness, it appears that he arrived in London on the 20th of December, 1781. On the seventeenth of that month the cause in which [*46] he was to be witness was put off, in consequence of a letter received from him, stating that he could not attend until after the next term. He swears in his affidavit, that on coming to town he was served with a subpoena, by his own desire, which was on the 20th of December, the last day of the sittings. Whether the subpoena was for the sittings after the last or the next term, does not appear on the affidavit; but as no subpoena issued after the 12th of December, it must have been for the last term, when, by consent, the cause was postponed. He was arrested on the 28th of De-

¹ S. C. cited Tidd's Pr. 198, 8th edit.

ember, at which time there was no process by which he could be compelled to attend as a witness. The protection afforded to witnesses is not on their own account, but for the purposes of justice: and when the defendant found that the cause could not come on at those sittings, and that it was unsafe for him to remain, he might have returned. It is stated in the affidavit, that an application was intended to be made for permission to examine him upon interrogatories; but that allegation is insufficient, for the consent of both parties is necessary to that proceeding, and it does not appear that it could have been obtained. [The Court giving no opinion on the two latter grounds of the application, the arguments of counsel on those heads are admitted.]

Lord MANSFIELD (stopping *Dunning*, who was for the rule). This is the first case of a witness coming from abroad who has required the protection of the Court. That protection is extended to witnesses coming from abroad as well as to those who are resident in this country. Although in England a party may have the benefit of the evidence of a witness who has been arrested, by means of a *habeas corpus ad testificandum*, yet, in order to encourage witnesses to come forward voluntarily, they are privileged from arrest. This privilege protects them in coming, in staying, and in returning, provided they act *bonâ fide*, and without delay, which is a question of reasonableness. Every reason which applies to the protection of a witness at home, holds more strongly with regard to a witness who comes from abroad. The creditor is not injured by his coming; for unless he came, there would be no opportunity of arresting him. The service of the *subpœna* abroad would be an useless form; he cannot be punished for not coming; if he comes at all, then it must be voluntarily. The cause depending on the *evidence of a witness who is out of the country, the time of trial [*47] must necessarily be uncertain. The only question then to be considered is, whether, in such case, the witness comes *bonâ fide* or collusively.

There never was a fairer case than the present. The parties would not consent to examine the witness upon interrogatories, or to put off the trial; an application was therefore made to me, upon affidavits and letters from the witness. I proposed, and it was so settled, that at all events the cause should go on after this term, whether the witness came or not. In the mean time he arrived, before the sittings were over; but I do not wonder that the parties did not apply to bring on the cause, for it was near Christmas. It is admitted that he was protected for some time;—why not until the next sittings? Was he to go back again to Paris, merely to return here this term, putting the parties to an enormous expense? I am of opinion, that all the rules which apply to the protection of witnesses here, hold with regard to witnesses coming from abroad, and that the defendant must be discharged.

ASHURST and WILLES, Justices, of the same opinion.

BULLER, Justice.—It is not true that the privilege of a witness depends upon the *subpœna*. I have found a case (E. 27, Car. 2) where a man was discharged who came to London to make an affidavit, which might have been made in the country; but it was for the furtherance of justice, and he was therefore protected. No *subpœna* is necessary where the witness lives abroad.

Rule absolute.

The discharge, being on the privilege, was without the terms of filing common bail.

The KING v. Inhabitants of KEEL. Feb. 6.

(Reported, CALDWELL, 144.)

The KING v. James RODD. Feb. 6.

(Reported, CALDECOTT, 147.)

[*48]

*The KING v. MORGAN. Feb. 9.

(Reported, CALDECOTT, 156.)

The KING v. Inhabitants of COVENT GARDEN. Feb. 9.

(Reported, CALDECOTT, 158.)

DOE, on the demise of W., DUKE of DEVONSHIRE; W. H., DUKE of PORTLAND; and DOROTHY, DUCHESS of PORTLAND, his Wife, v. LORD GEORGE HENRY CAVENDISH.¹ Feb. 11.

The Countess of Burlington by will devised certain estates to trustees, to the use of W. Lord Cavendish for life; remainder to trustees to preserve, &c.; remainder to the use of one or more of such of the child or children of W. Lord C., for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisos, restrictions, &c., as the said W. Lord C. should by any deed, &c., or by his last will, &c., direct, limit, or appoint. W. Lord C., by his will, devised the premises to trustees, to the use of his son Richard for life; remainder to trustees to preserve, remainder to trustees for a term, for providing jointures and portions for the wife and children of Richard; remainder to the first and every other son of Richard, in tail male; with remainder to testator's son George for life, and the sons of that son, in tail male; remainder to his eldest son William, in fee. The will contained considerable bequests of personalty to all the children. Held, that this was a good execution of the power, and that if not good as to the children of Richard, that the limitation to George took effect.

EJECTMENT for a messuage in the parish of St. James's, Westminster, tried before Lord MANSFIELD at the sittings in this term, when a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:

The Countess of Burlington being seised in fee of the messuage in the declaration mentioned (amongst other estates), made her will, dated the 20th of February, 1755, whereby she devised all her manors, messuages, lands, &c., in Great Britain and elsewhere, to Richard Arundel and Christopher Denton, and their heirs; to the use of her son-in-law, William Lord Cavendish, commonly called the Marquis of Hartington, for life, without impeachment of waste; remainder to the same trustees to preserve contingent remainders. "And from and immediately after the decease of the said William Lord Cavendish, to the use and behoof of one or more of such of the child or children of the said William Lord Cavendish, by Charlotte Lady Cavendish, his late wife, deceased, *for such estate and estates, and in such shares* [*49] *and proportions, and under and subject to such *powers, provisos, conditions, restrictions, or limitations* as the said William Lord Cavendish should, by any deed or deeds, writing or writings, to be by him signed and sealed

¹ S. C. 4 T. B. 741 (n.); but without the arguments of counsel.

in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, to be by him signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses, nominate, direct, limit, or appoint; and for want of such nomination, direction, limitation, or appointment, to the use and behoof of all and every the child and children of the said William Lord Cavendish, by the said Charlotte Cavendish, his late wife, equally to be divided between them; if more than one, share and share alike, to take severally, as tenants in common, and not as joint tenants; and of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing; and failing issue of any of the said children, then as to the share or shares of him, her, or them so dying without issue, to the use and behoof of all and every such other child or children, equally to be divided between them, if more than one, share and share alike, to take in like manner, as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of such other child and children lawfully issuing; and in case all such children shall die without issue, or that there shall be but one such child then living, to the use and behoof of such one only child, and the heirs of his or her body, lawfully issuing; and for default of such issue, to the use and behoof of the said William Lord Cavendish, his heirs and assigns for ever." With a power to William Lord Cavendish to make leases in possession for twenty-one years; after which was the following clause: "I give and bequeath all the rest and residue of my personal estate and effects, of what nature or kind soever, unto the said William Lord Cavendish, his executors, administrators, and assigns, in full confidence that, in case there shall remain in his possession any surplus of my personal estate, he will distribute and divide the same amongst his said children at his discretion; and I do hereby nominate and appoint the said William Lord Cavendish sole executor of this my last will and testament."

The said Countess of Burlington died soon after making her said will; and the said William Lord Cavendish, afterwards Duke of Devonshire, having issue then living, three *sons, William, now Duke of Devonshire, Richard Lord Cavendish, and George Lord Cavendish, and one [*50] daughter, Dorothy, now the wife of the Duke of Portland, by virtue of the said will entered into the possession of the messuage in the declaration mentioned, being part of the premises so devised to him, and continued in such possession to the time of his death.

The said William, Duke of Devonshire, deceased, duly made and executed his will, dated 18th of May, 1763.

"Also I give and devise unto my brothers, George Cavendish and Frederick Cavendish, their heirs, executors, &c., all such my real estate and estates in possession, reversion, remainder, or expectancy, as I have power to dispose of, either by the will of Dorothy, late Countess of Burlington, deceased, or of my own or my late father's purchase, or otherwise howsoever. And likewise all my moneys, securities for money, and money which I have power to raise out of my estate or estates, and all other my personal estate, of which I have not already made, or shall hereafter make, any particular appointment or appointments (except such parts thereof as I shall hereinafter bequeath to my eldest son), in trust that they, my said brothers, and the survivor of them, and the heirs, executors, and administrators of such survivor, do thereout pay, apply, and appropriate unto and to the use of my daughter Dorothy the sum of £30,000, which I give to her as her portion, or fortune, with interest from the time of my death, after the rate of four per cent. And afterwards, as soon as conveniently may be, to lay out the residue of my said personal estate in one or more purchase or purchases of

lands, or tenements of inheritance; and till that can be done, invest the same in real or government securities, and pay and apply the rents and profits of all my said real estate, and the interest and income of all my said personal estate, to and for the benefit of my said two younger sons, Richard and George Cavendish, in equal shares, until the younger of them shall have attained the age of twenty-one years; and then make an equal partition of my said real and personal estate, if any shall then remain personal, and stand seised thereof, or cause the same to be conveyed or settled (that is to say), as to one divided moiety thereof, to the use of my said son Richard for life; remainder [to the same trustees to preserve contingent remainders]; [*51] remainder to my brother, *John Cavendish, and the Earl of Besborough, their executors and administrators, for the term of five hundred years, in trust for the purposes hereinafter mentioned; remainder to the first and every other son of my said son Richard successively, in tail male; remainder to my said son George for life; remainder [to the same trustees to preserve contingent remainders]; remainder [to J. C. and Lord Besborough for five hundred years]; remainder to the first and every other son of my said son George successively, in tail male; remainder to my eldest son, William Cavendish, his heirs and assigns, for ever."

The other moiety was limited to Lord George Cavendish for life, with like remainders over.

The trust of the terms was declared to be for the purpose of providing such jointures to the wives of Lord Richard and Lord George, and such portions to their younger children, as the said four trustees should think reasonable and direct; and that if either of them should die, leaving only a daughter or daughters, for the purpose of raising such portions for such daughter or daughters as the said trustees should think proper and direct, so as no one daughter should have more than £10,000.

The said testator, William, Duke of Devonshire, died, without altering or revoking his said will, leaving issue William, the present Duke of Devonshire, Dorothy, now Duchess of Portland (the lessors of the plaintiffs), Richard Lord Cavendish, and the defendant Lord George Henry Cavendish.

The personal estate of the said William, Duke of Devonshire, amounted to upwards of £20,000, after payment of the said £30,000 given to the Duchess of Portland, which has been paid her; and the real estate, devised to the said Lord Richard and Lord George Henry Cavendish, amounted to upwards of £2000 per annum.

The said Lord Richard Cavendish is lately dead, a bachelor.

The question for the opinion of the Court is, whether the will of the late Duke of Devonshire is a good execution of the power given to him by the will of Lady Burlington, or to any and what extent?

Balguy, for the lessors of the plaintiffs, took three several objections to this execution of the power.

1. That the power in the late Countess of Burlington's *will entitled the late Duke to appoint only to children by his late lady, and not to grandchildren; whereas, in the execution of that power, he has given his own children only life estates, and given the inheritance to his grandchildren, as purchasers.

2. That the jointuring and raising portions for the younger children of his younger sons, Lord Richard and Lord George, are not within the power, or that, if they are, the execution is bad; such jointures and portions being left to be provided and raised by the discretion of others, and at best being but a power. *Delegatus non potest delegare*.

3. That the ultimate limitation to the present Duke is void; and that such residue is undisposed of, and will go equally amongst the present Duke,

the Duchess of Portland, and Lord George Henry Cavendish; first, because it is but a remainder; and as the power does not use the words "such time and times," the late Duke could not give other than immediate interests; secondly, because, it being a limitation after failure of issue male of Lord Richard and Lord George, though that issue male could not take if the first objection prevailed, yet they would prevent the remainder over to the present Duke from taking effect.

If these objections should all prevail, then he contended, that the execution of the power was wholly void; for though he admitted that the execution of a power might be good in part, and bad in part, yet if it would be more agreeable to the scope and tenor of the power that the whole should fall than that part should be supported, the Court would put that construction upon it. If only some of the objections should prevail, he hoped the Court would draw the line, in a family concern, how far the power was well pursued.

He cited, and much relied upon the case of *Alexander v. Alexander*, Canc. 1755, 2 Ves. sen. 640, as going to the whole of the case he had to maintain; and said, that though the expressions used in the two powers were somewhat different, yet that arose from their applying to different subject-matters. With that difference, the words were equally large and comprehensive in the one case as in the other. He also cited the cases of the *Attorney-General v. Dr. Berryman*, Canc. 1752, cited 2 Ves. 643; and *Ingram v. Ingram*, Canc. 1740, 2 Atk. 89.

**Graham*, for the defendant, said he should contend, 1. That Lady Burlington might, by law, have given a power as extensive as that [*53] exercised by the late Duke in his will; and, 2. That by the fair and natural construction of her will she had done so.

1. All the children of the late Duke were *in esse* at the time of Lady Burlington's death, so that the uses might, by law, be suspended as long as they were, in fact, suspended by the late Duke's will; which could not have been if the late Duke had had no children living at her death; according to *Humberston v. Humberston*, Canc. 1716, 1 P. Wms. 332.

2. Powers are of two kinds: first, powers of appointment to uses; and secondly, powers of leasing, committing waste, raising portions, and settling jointures. The latter are out of the question. The former were creatures of equity till the statute annexed the possession to the use. It was decided that the use need not be executed at the moment the conveyance was executed, but that the operation of the statute will wait till the use arises on a contingency; and so, in the same manner, when the use became fixed or appointed by the execution of a power. Consequently, powers, being transferred by the statute from equity to law, are to be construed as in equity.

A distinction is made between naked powers and powers coupled with an interest, as powers of leasing. The latter are said to be construed liberally, the former strictly. The reason given is that the former are part of the dominion of the original possessor. But that distinction is not well founded; for the latter are clearly part of the old dominion also, as in the present case. The true rule is, that powers are to be construed according to the instrument in which they are contained. If in a will, they are to be construed liberally. *Beale v. Beale*, Canc. 1713, 1 P. Wms. 244.

The case of *Alexander v. Alexander* is founded on no authority, and no decision resembling it is to be found either before or since. *Thwaites v. Day*, 2 Vern. 80, is rather against it; for there the limitations were as here; and though no question was made of their validity, it might have arisen; for if the limitation to the first and other sons was void, then the £500 legacy was too remote, as given after an indefinite *failure of issue of the youngest son. But *Alexander v. Alexander* was a case of personality. [*54]

The testator might well be supposed to mean, that the whole should be apportioned amongst his children as a provision for them. Courts of law and equity lean against limitations over of personality.

The words of this power are of greater latitude. What powers could be meant, but powers of leasing, jointuring, &c., all appendages of estates in strict settlement? What limitations? It is the language of the law to say, that a man holds an estate under limitations in strict settlement.

Sir Thomas Clarke says that the words "for better advancement in marriage" will authorize an appointment in strict settlement. 2 Ves. sen. 642. Then why will not the words "under and subject to such powers, provisos, conditions, restrictions, and limitations?"

At all events, the appointment is good, so far as it is clearly warranted by the power. Therefore the estates for life, in each moiety to each son, are clearly good; and the cross remainders, instead of being vested (as they would be if the whole appointment were good), are converted into contingent cross remainders, depending on the contingency of either son's dying without issue. Under the general words, the Duke could give a contingent interest to any child. Whether the remainder *in fee* to the Duke is good or not, it is not necessary to inquire. But that also is within the terms of the power. When the power is to appoint to one or all of the children, the appointment may be either of a present or reversionary interest to any one; for the doctrine that the share must not be illusory applies to cases where the appointment must be among all the children.

Though the grandchildren take as purchasers, they take only in consequence of the provision to their parents, and not as primary objects.

The appointment of the trustees of the five hundred years' term is not a delegation of the whole authority; for they are bound to raise the sums. A small discretion only is reposed in them, which is good if warranted by the general meaning of the power.

[*55] *Balguy*, in reply, said that arguing for a liberal construction *as to the objects of the power might possibly be agreeable to late cases, but that it was presuming the very point in debate to extend this power to grandchildren; that the admitting as liberal a construction of the power here, as in a court of equity, was surely as much as could be expected from him, but that it was too much to say in a court of law that courts of equity had been too strict; that as to the case of *Thwaites v. Day*, the point was not, nor could it be, made there; that there could be no doubt as to whom the power in that case should extend to, which was the very matter now in contention.

Cur. adv. vult.

Lord MANSFIELD now delivered the judgment of the Court. The question for the opinion of the Court is, whether the will of the late Duke of Devonshire is a good execution of the power to any and what extent? [His lordship then stated the words of the power, and the will of the late Duke.] At the opening of the argument, a ground struck me which seemed to be decisive, but the parties had not been aware of it, and the case was not adapted to it. I called for the will of the Duke of Devonshire. By that will he leaves great bequests to each of his children. To the Duke, furniture, crown leases, &c., to a great value, charged with £20,000. To the younger children, £1000 annuity, and £1000 in cash. There were great provisions made for all his children. At the Duke's death his children were all under age; they have since attained their full age, have taken under the will, and have enjoyed their bequests.

The first ground, which seems to be very clear, is, that it is not permitted to any of the parties who take under the Duke's will to dispute it. Their

mouths are closed. It is a tacit condition annexed to every bequest by will, that the taker is bound, not only not to object, but also to maintain the title of the rest, unless he chooses to give up his own portion; a most reasonable rule, because a man makes a will presuming that the whole of it will stand. What, then, is the case with regard to the will of the Duke of Devonshire? The tenants for life, under that will, are tenants in tail under the will of Lady Burlington. If they choose to take as tenants in tail, they must renounce all benefit under the Duke's will.

*The second ground is this: The lessors of the plaintiffs contend that the execution is void *in toto*. As to that, we are of opinion, [*56] that though the limitation to the grandchildren be void, yet the limitation to Lord George will be good, so as to prevent the lessors of the plaintiffs from recovering. But see *Alexander v. Alexander*, 2 Ves. 640; *Robinson v. Hardcastle*, B. R., H. 28 Geo. 3, 2 T. R. 251; *Sugden on Powers*, 550, 4th edit.

The third ground, which is the question to which the case is adapted, is, Whether the power is well executed, to any and what extent. As to that, as the parties desire our opinion, we will give it, though it is not necessary.

It is clear that all powers must be executed according to their meaning. It is clear also, that in the case of a power to appoint, amongst several objects, the execution cannot extend beyond those objects. All the cases to be found on this subject have arisen on the question, Who were the objects intended; *Alexander v. Alexander* is no more. *Maddison v. Andrew*, Canc. 1 Ves. 57; 2 Br. C. C. 26 (n.) *semble*, S. C. See *Sudg. on Powers*, 510, 4th edit. But no conclusion can be drawn from hence that children can never mean grandchildren.

There are three grounds which induce us to consider this a good execution of the power:—1. The subject-matter of the power. 2. The limitations for want of appointment. 3. The words made use of in creating the power. First, With regard to the subject-matter. This is not money. It is not a provision for children, since they are all provided for. It is a limitation of a family estate. She puts the father in her place, to limit the estate in any way he pleases. If the words "strict settlement" had been used, no dispute would have arisen; but Lady Burlington uses words tantamount to those. The English language does not afford stronger words to show that she meant an appointment in strict settlement. Lord Cavendish was to appoint for "each estate and estates, and in such shares and proportions, and under and subject to such powers," &c. She meant by this, such a settlement as the Duke would make in his own family.

Partial objectments have been made, as that the Duke of Devonshire could not take a reversion; see *Sugden on Powers*, 517, 4th edit.; and *Alexander v. Alexander* was cited; but that was a case of money. [*57] Then it is said, that the jointures and portions are at the discretion of others, and that a power cannot be delegated. The maxim is true; but it does not apply. Lady Burlington gives the Duke absolute power; and, in pursuance of that, he gives the power of jointuring. On all these grounds, we are of opinion against the lessors of the plaintiffs.

Postea to the defendant.¹

¹The above decision, so far as it relates to the execution of the power, cannot, as it seems, be now considered law. A similar point arose in *Griffith v. Harrison*, Canc. 1791, 8 Br. C. C. 410, when a case was directed for the opinion of the Court of King's Bench. After argument that Court was divided in opinion. Lord KENYON and Mr. Justice GROSS certifying, that the power must be exhausted upon the children; and Mr. Justice ASHURST and Mr. Justice BULLER holding in conformity with, and on the authority of, the principal case, that the word "children" might include "grandchildren," and that the will of the testator required that construction. *Griffith v.*

Harrison, B. R., T. 32 Geo. 3, 4 T. R. 737. In a subsequent case it was held, both by the Court of King's Bench and by Lord ELDON, that a similar power did not authorize a limitation to grandchildren, notwithstanding the power contained the words insisted upon by Lord MANSFIELD in the principal case, "for such estate and estates, and with and under such charges, provisions, conditions, and limitations," &c., *Brudenell v. Elwes*, B. R., E. 41 Geo. 3, 1 East, 442; 7 Ves. jun. 382. In *Doe dem. Allan v. Calvert*, B. R., E. 42 Geo. 3, 2 East, 381, on the case of *Doe v. Cavendish* being cited at the bar, LAWRENCE, J., observed, that it was one that would not rule any other, and that he had heard Lord KENYON express that opinion of it. It appears also to have been doubted both by Lord THURLOW (2 Br. C. C. 29), and by Lord ALVANLEY (4 Ves. jun. 684).

In observing upon the case of *Doe v. Cavendish*, Mr. Sugden, in his *Treatise on Powers*, p. 506, 4th edit., says, "Upon the foregoing decision it need only be remarked, that as to the first ground, it can at most only go in aid of the construction upon the words of the power itself; that the second ground bears against the construction of the Court, as the estate was, in default of appointment, given amongst the children in tail, so that they might acquire the fee, and their issue could only take through them, and not as purchasers; and that in regard to the third ground, the objects were, the child or children, and the general words are merely those which are usually inserted by conveyancers, with a view to the interests to be given to the objects designated, and not with an intent to extend the power by implication to objects not named in it." And again, Mr. Sugden says (p. 510), "If the case of

[*58] *Brudenell v. Elwes* is to be treated as a binding *authority, a power, in the precise words of the Duke of Devonshire's case, must now be held to extend to children only. It would be idle to attempt to distinguish the cases. The powers are nearly word for word the same."

WORSLEY, BART. v. BISSET.

The Court will not put off a trial on the ground of the absence of a material witness, when it appears that no application has been made to the witness to know whether he will attend.

In an action for criminal conversation with the plaintiff's wife, the defendant obtained a rule to show cause why the trial of this cause, which stood for the sittings after this term, should not be put off, on account of the absence of Lord Cholmondeley, who was at Paris, whom the defendant apprehended to be a material witness, and whom he expected home in the course of a few months. But it not appearing that any application had been made to Lord Cholmondeley to know whether he would come over and give evidence, the rule was discharged; Lord MANSFIELD saying, that it was by no means of course to put off a trial on such a general affidavit; see *Tidd's Pr.* 831, 8th edit.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

IN THE TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.

HUTTON v. BOLTON.¹ April 18.

In an action against a coach-owner for losing a trunk, the defendant was allowed to pay into Court the amount of the sum to which he had, by notice, limited his responsibility.

THIS was an action against the defendant, a coach-owner, under the following circumstances. The plaintiff had delivered a trunk, which he swore to be of the value of £20, to the defendant, to be carried. The trunk being lost, the defendant offered to pay £20, declaring that he had put an advertisement into the newspapers, signifying that he would not be answerable beyond that sum, unless the parcels should be booked. This he meant to make the ground of his defence; and he had obtained a rule to show cause why he should not be permitted to pay the £20 into court.

Erskine showed cause.—When the damages are uncertain, the defendant cannot pay money into court; — *v. Farrell*, B. R., E. 12 W. 3, 12 Mod. 397; *Fisher v. Prince*, B. R., M. 3 G. 3, 3 Burr. 1363. It may be necessary not only to set a value upon the goods, but likewise to estimate the inconvenience which the plaintiff may have sustained. There is also another fact to try in this case, viz. whether there was any notice to the party; for notice to the public only would not be sufficient.

**Baldwin, contra*.—The fact of notice must be proved at the trial, otherwise the plaintiff must have a verdict to the full value of the goods lost. The present application is just and reasonable, although it may not be supported by precedent. It would be a great hardship upon the defendant if he should be compelled to pay costs upon a verdict for the £20, which he is now ready to pay. The Court is not called upon to settle any question of damages; the defendant, at the trial, must show that he is only liable for the stipulated damages, which he has paid into court, or the plaintiff must have a verdict.

LORD MANSFIELD.—When I first came into this court there was a difficulty about delivering up goods in an action of trover, because, as it was said, the Court does not keep a warehouse. But I thought that a delivery to the party would do as well. The object is, that unnecessary litigation should be prevented, and that the plaintiff who chooses to proceed for more than is due should not recover costs. Here, according to the defence set up, a specific sum is due, and I do not see why a tender should not be made. If he is liable for more than he has paid into court, no injury is done, for the plaintiff will have a verdict, and the defendant must pay the costs. Upon principle I am inclined to think that the defendant ought to be permitted to pay the money into court.

ASHURST, Justice.—The costs should fall on the party who is in the wrong. The facts are equally in the knowledge of both parties. It is a different case from those which have been cited, for the defendant does not litigate the value.

BULLER, Justice.—This is a new question. The case in *Burrow* is distinguishable, for there the goods were not lost, but damaged. Upon principle, I see no difficulty. It is said that the plaintiff may recover for the inconvenience he has suffered; but the action is *assumpsit* for not delivering goods, and no special damage is laid. The inconvenience, therefore, cannot be given in evidence. I think that a tender might be pleaded; for, as I have just said, it is merely an action for the value of the goods. The defendant might have set out his whole defence specially, and then pleaded a [*61] tender. I can see no objection to such a plea; and, upon the whole, I am of opinion, with my Lord Chief Justice, *that the defendant should be permitted to pay the money into court.

Rule absolute.¹

¹ But where, in *assumpsit* against a carrier to recover the loss sustained by the sinking of the defendant's barge, whereby the plaintiff's goods were spoiled, the defendant applied for leave to pay into court the *invoice price* of the damaged goods, the Court of Common Pleas refused to permit the money to be paid in, observing that the courts had not gone so far as to allow money to be paid in, in cases of uncertain damages; but that, where there was any contract between the parties upon which the Court could rest, it might be done. *Fail v. Pickfork*, C. B., T. 40 G. 8, 2 B. & P. 234. This case cannot be considered as overruling the decision in the text, in which there was a contract between the parties upon which the Court could rest, viz. the special contract, that only a sum certain should be paid, unless the terms of the defendant's notice were complied with. Although, in one case, it was held that the payment into court of the sum to which the carrier had restricted his liability, was such an admission of the contract stated in the declaration, as to preclude the defendant from giving his notice in evidence; *Yates v. Willan*, B. R., M. 42 G. 8, 2 East, 128; yet the authority of that decision has been shaken, if not destroyed, by the opinion of the Court in the subsequent case of *Clarke v. Gray*, B. R., T. 45 G. 6 East, 564.

MASON v. SAINSBURY and Another.¹ April 19.

Where insurers have paid the amount of the loss occasioned by the demolition of a house by rioters, they may maintain an action in the name of the assured, against the Hundred, under the statute 1 G. 1, c. 5, s. 6.

THIS was an action, on the riot act, to recover damages sustained by the demolition of a house in the riots of 1780. There was a verdict for the plaintiff, with £259 damages, subject to the opinion of the Court, on a case which stated that the plaintiff had insured the house in the Hand-in-Hand

¹ S. C.; but without the arguments of counsel. *Marshall on Insurance*, 794, 2d ed.

fire-office, which had paid the loss; and that this action was brought in the plaintiff's name, and with his consent, for the benefit of the insurance-office. The case was argued, in Hilary Term, by *Mingay* for the plaintiff, and by *Davenport* for the defendants.

For the plaintiff it was contended, that there were a variety of cases like the present, in which an action might be maintained in the name of the person originally interested, *although, by a private transaction, the right may be, at the time of suit, vested in another, as in the case of an assign- [*62] ment of a bond: that the premium was paid by the plaintiff, and that the Hundred could make no claim to the benefit of it, for the punishment of whose negligence the act was passed.

For the defendants it was said, that it was impossible that a plaintiff could recover in respect of that for which he had already received a satisfaction. Having two remedies, he has selected that which was most proper. Had he been short insured, he might still recover the deficiency against the Hundred. The persons intended to be protected by the act are the real owners of the property in question. Could a mortgagee bring an action because his security is lessened? An insurer is not a person damnified, because he has an adequate premium. Is he to keep his premium, and yet not to pay the loss? The plaintiff has made his election, not to avail himself of the act of parliament, but to stand upon his own contract.

The Court, considering it to be a case of great importance, directed another argument, which came on in this term.

Wallace, A. G., for the plaintiff.—By a former clause of the statute, the offence is made felony; before the statute, the party injured had his remedy by action of trespass; but, by the act, the inhabitants are put in the place of the trespassers. *William v. Hill*, C. B., E. 32 G. 2, 2 Wils. 91. The question then will be, whether the trespassers themselves could have set up this defence? Could they object that the plaintiff has sought another remedy, and that he cannot have a double satisfaction? Whether the insurance be considered as an indemnity, or as a wager, the rights of the parties will not be altered. The insurer, it is true, is put in the place of the insured, but the liability of the inhabitants remains the same. In private contracts, whatever advantages result to the parties, third persons cannot avail themselves of them. If a landlord covenants for quiet enjoyment against all persons, in case of eviction he must make satisfaction to his tenant, but the trespasser shall not therefore be excused: the landlord must sue in the tenant's name. In actions of escape, if the jury give the whole debt, the sheriff shall sue the original *debtor in the plaintiff's name. If this action had been brought before payment by the insurer, the plaintiff would recover [*63] less against him by the amount recovered. The insurer only pays what is not received from any other quarter. In the case of principal and factor, the one may use the other's name. This action is for a single satisfaction, and the Hundred must make satisfaction to somebody.

Adair, Serjeant, contra.—There is no reported decision on this point, and the argument on the other side goes entirely upon analogies, a very fallacious mode of reasoning. The policy of the act, in addition to the inducement to suppress riots, was to divide the loss, and prevent the ruin of individuals; but there is no reason for extending that object, beyond the party himself, to bodies, or to individuals, who have voluntarily exposed themselves to this danger. It is asked, could the trespassers have availed themselves of this defence? It is not necessary to answer that question, since it is only for a particular purpose that the inhabitants are put in their place. It might, indeed, be well argued, that the trespassers should be permitted to avail themselves of that defence; for though it is true that a man who has two

remedies may pursue either of them, and that it is no defence to say he has another mode of proceeding, yet, where he has once availed himself of one remedy, and recovered, he shall not be allowed to pursue the other. It is not necessary to contend, that if the plaintiff had proceeded in the first instance against the Hundred, the fact of the insurance having been effected would have been a defence. The present case has been assimilated to that of a wager. [Lord MANSFIELD.—It cannot be a wager, for then the sum must be paid both by the Hundred and by the office.] Taking it to be a wager, the party losing will not be allowed to bring an action and say, "It was owing to you that I lost my wager." It must be an indemnity. Third persons cannot avail themselves, at law, of private contracts to which they are not parties, and therefore equity, in some cases, allows them to sue in another's name, since the forms of law will not suffer them to do it in their own. Here there is no such equity, for the insurers do not suffer by any act of the defendants. The whole risk was covered by the premium. If the loss had been suffered by the wrong of the defendants, the insurers would have been able to maintain an action on the case in their own name: but here the

[*64] *action being in the name of the plaintiff, who has received a complete satisfaction, cannot be maintained.

Wallace, in reply.—This is not the case of a double satisfaction, it is only using the plaintiff's name to recover a single satisfaction. Suppose the amount of the damage had been paid by a charitable contribution, would that excuse the Hundred?

Lord MANSFIELD.—The facts of this case lie in a narrow compass. The argument turns much on want of precision in stating the case, as most arguments do. The office paid without suit, not in case of the Hundred, and not as co-obligors, but without prejudice. It is, to all intents, as if it had not been paid. The question, then, comes to this, Can the owner, having insured, sue the Hundred? Who is first liable? If the Hundred, it makes no difference; if the insurer, then it is a satisfaction, and the Hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear: the act puts the Hundred, for civil purposes, in the place of the trespassers; and, upon principles of policy, as in the case of other remedies against the Hundred, I am satisfied that it is to be considered as if the insurers had not paid a farthing.

WILLES, Justice.—I am of the same opinion. I cannot distinguish this from the case of the escape. The Hundred is not answerable criminally, but they cannot be considered as free from blame. They may have been negligent, which is partly the principle of the act.

ASHURST, Justice.—At all events the plaintiff must have a verdict for the amount of the premium, as to which he has received no compensation. But, on the larger ground, I agree with my lord, that it is like the case of an abandonment. They are not to be in a worse condition by paying without a suit.

BULLER, Justice.—Whether this case be considered on strict legal principles, or upon the more liberal principles of insurance law, the plaintiff is entitled to recover. Strictly, no notice can be taken of anything out of the record. Taken in its narrow form, the contract is only a wager; more liberally construed, it is an indemnity. Still, upon the words, and as to third persons, it is only a wager, of which

[*65] *third persons shall not avail themselves. It has been admitted, and rightly, that the Hundred is put in the place of the trespassers. How could they have availed themselves of this defence? By plea of accord and satisfaction? It was not paid as satisfaction, and the evidence would not have supported such a plea. In the

case put of the escape, the recovery is not a satisfaction, and the sheriff may sue.

The better way is to consider this as a contract of indemnity. The principle is, that the insurer and insured are one, and, in that light, paying before or after can make no difference. I am, therefore, clearly of opinion, that the Hundred cannot avail themselves of this defence.

*Postea to the Plaintiff.*¹

¹ In the case of *Clarke v. The Inhabitants of the Hundred of Blything, B. R., M. 4 G. 4, 2 B. & C. 254, 3 D. & B. 489, S. C.*, it was held, on the authority of the above case, that the receipt of the amount of the loss from an insurance office would not prevent the plaintiff from maintaining an action against the Hundred on statute 9 G. 1, c. 22. The present case appears, in principle, to be at variance with that of *Bird v. Randall, B. R., M. 3 G. 3, 3 Burr. 1845, 2 W. Bl. 373, 387, S. C.*; but the authority of the latter was questioned by Lord ELLENBOROUGH in *Godsall v. Boldero, B. R., M. 48 G. 8, 9 East, 78.*

GREY v. COOPER.¹ April 19.

The infancy of the payee is no answer in an action by the endorsee of a bill of exchange against the drawer.

THIS was an action on a bill of exchange, by the endorsee against the drawer. The declaration stated, that the defendant drew the bill payable to one Walker, who endorsed it to Holbrook, who endorsed it to Shipden, who endorsed it to the plaintiff. Pleas: 1. *Non assumpsit*; 2. That Walker, at the time of the endorsement by him, was an infant. Demurrer to the second plea.

Morgan, for the defendant, was desired by the Court to begin. It is stated that the infant was a person using trade and commerce; but, admitting that allegation to be mere form, the infancy is a good plea, as duress or insanity would be. It ought, at least, to be shown, that the infant was benefited by the endorsement, as that he received a *valuable consideration for it. [^{*66}] *Thompson v. Leach, B. R., T. 2 W. & M. 3 Mod. 301*; *Lloyde v. Gregory, B. R., T. 14 Car. 1, Cro. Car. 502*; *Br. Ab. tit. Coverture, 40*; *Roll. Ab. tit. Coverture, 728.*

Davenport, for the plaintiff.—Perhaps this action might not be maintained against the infant himself; but the answer to the present objection is, that a man having made a negotiable instrument, shall not refuse to pay it to the person to whom it was given, or to the person to whom the payee was authorized by him to endorse it. A valuable consideration for the endorsement must be presumed; and as to the objection that the infant is not a trader, the defendant is estopped, by his having drawn the bill payable to the infant, from making that objection.

Lord MANSFIELD.—The ground on which the drawer is charged is, that he drew a bill by which he engaged to pay according to the order of the payee, whoever that payee might be. He might give the infant an authority which the law itself does not give him. In the same manner he may give a bill to his own wife. The drawer says, "let anybody trust the payee on my credit." The acts of an infant are void, or not, accordingly as they are for his benefit. The privilege of an infant is personal, and there is no question here as between the infant and another person. The infant sets up no claim, and the drawer is liable to pay.

Judgment for the plaintiff.²

¹ Short note of S. C., 1 Selw. N. P. 287, 4th ed.

² See *Jones v. Darch, Scacc. T. 57 G. 3, 4 Price, 800*; *Taylor v. Croker, cor. Ld. ELLENBOROUGH, 4 Esp. N. P. C. 187.* See also *Nightingale v. Wittington, 15 Massachusetts Rep. 272, Bayley, 84, American ed. Pardessus, Droit. Com. vol. ii. p. 459.*

EYRE v. LOVELL and Another. April 23.

A proxy made by a Canon to act for him in his absence, in all corporate business, is not revoked by the Canon making the proxy having, in an intermediate period, appeared and acted for himself.

THIS was an action of trespass for breaking and entering the plaintiff's house at Wells, tried before BULLER, Justice, at the summer assizes for Bridgewater. The jury found a special verdict, which stated, that the Dean and Canons residentiary of Wells had been, from time immemorial, a corporate *body, not exceeding eight, nor less than six : that they were [67] seized, in fee, of the house in question, which had been used to be collated by grant under the common seal : that the Dean and Canons have been used to appoint, by an instrument called a proxy, one or more of the said Canons to act for such Canon in his absence, in all corporate business : that the Canon so appointed hath, during all the said time, continued to act without any new appointment or proxy, at meetings subsequent to any meeting where the person appointing had been present, and had acted for himself.

That John Walker, Clerk, one of the said Canons, seized of the house in question for his life, died on the 8th of November, 1780 ; that, on the 15th of November, the Dean summoned a meeting to make a collation of the said house ; that the Dean and R. Wilson, another of the said Canons, voted for the plaintiff, and the Dean produced proxies from Thomas Payne and Phipps Weston, two other Canons, and gave their votes for the plaintiff ; that John Turner, another Canon, produced proxies from W. Blencowe and C. Moss, two other Canons, and gave their votes and his own for the defendant. [The special verdict stated the proxies to the Dean at length. That from Thomas Payne had these words : " Make, nominate, constitute, and appoint the Right Hon. and Reverend Lord Francis Seymour, Dean of the said cathedral church, my true and lawful proctor, for me, and in my name, place, and stead, to appear," &c. That from Phipps Weston was nearly the same, but used the words " whenever I shall be absent."] That after the making of the said proxies, Thomas Payne and Phipps Weston had personally appeared and acted for themselves. That W. Blencowe and C. Moss had not appeared and acted for themselves. The Dean and his party collated the plaintiff, and afterwards the other party sealed a collation to the defendant. That the plaintiff entered and was possessed, and that the defendant disturbed him in his possession ; but whether, &c.

Plumer, for the plaintiff.—It is objected to the plaintiff's two proxies, that after the proxies given the principals appeared in Chapter and voted, and thereby vacated their proxies. But neither by the rules of the canon law, nor by the usage as stated in the special verdict, were the proxies vacated. Whenever a person has a private right he may *delegate it to [68] another to act for him, when there is no personal duty necessary. Domat. l. 1, c. 15. It is indifferent to the rest of the world whether the man having the right acts in person or not. It merely regards the principal and his delegate ; and the intention of the party governs the authority. Dig. l. 17, c. 4. There may be requisites as to the person of the proxy : thus, as to Chapters, the proxy must be a member of the Chapter ; so, a proxy *ad litem* must be subject to the rules of the court. All the books distinguish between proxies *ad litem* and *ad negotia* ; but where these personal requisites are not in question, the intention of the parties must govern. Did these persons, therefore, intend to give a limited or a general authority, to be vacated by their appearance, or to be extended beyond it ? The situation of the parties requires a permanent proxy. The duties of Canon residentiary require occa-

sional attendance upon the Chapter and occasional absence. According to the construction for which the defendant contends, the party might be obliged to make a proxy every time. It is more consistent, where the words are doubtful, to construe the proxy permanent. The words of one of the proxies are very strong—"whenever I shall be absent." The usage, also, has been invariable to act under these proxies in all absences. The other side, therefore, must show some rule of law controlling the intention of the parties. The appearance of the party himself can only operate by showing a presumed intention to revoke. But it is alleged that the authority is vacated by matters *dehors*. That can only be in one of three modes; by the destruction of the subject-matter, by want of capacity, or by a change of the situation of the parties. But here the subject-matter remains the same, there is no want of capacity, and the presumption of change of intention is rebutted by the acts of the parties. No writer has ever stated that appearance alone will vacate, unless in cases of proxies *ad litem*, and then the vacating is only presumptive, and is liable to be rebutted. *Menopius de Præsumptionibus. Baldus, Decret. l. 1, tit. 19, De Procuratoribus*. The proxy *ad litem*, if proxy *simpliciter*, is *dominus litis*. Process is served on him, and the suit is carried on in his name; the appearance of the principal, therefore, does afford a presumption of revocation. Having delegated the whole of his power, appearance certainly revokes part; but even there the presumption may be rebutted. An objection *may be founded on the usage of the House of Lords, and the practice at the Bank. The proxy of the Lords was originally by [*69] license from the Crown; and writs, with an exception of the power of making a proxy, are to be found. 6 Selden, 1476. The power to make a proxy used to be given at the same time with leave of absence, and it followed, that when the absence expired, the proxy which was incident to it expired at the same time.¹ Besides, the proxy of a peer is a proxy *simpliciter*. Originally, any person, though not a peer, might have been a proxy, and the number was not limited; but now, by the order of the House, there can be only two held by one peer. The practice at the Bank is peculiar to, and regulated by, that corporation, and cannot extend beyond the body which makes it. [Lord MANSFIELD.—They have a new fee on every letter of attorney.]

Wilson, contra.—Proxies, from their nature, are revocable by appearance. A proxy cannot be made irrevocable. The principal, by acting himself, resumes the power which he has given, and the subject-matter of the proxy is destroyed. A new deed is necessary to revive it. In all the funds the practice is so, though there are no new fees, but new stamps. The *procurators ad litem* resembled our attorneys, and were governed by the peculiar rules of the Courts.

Lord MANSFIELD.—I cannot see a doubt in the question. The words in the two proxies amount to the same thing. The absences are frequent, the summons to attend short. The proxy must mean every absence. Some proxies relate to a particular absence, but here the proxy is general to act in absence. The appearance does not revoke it, because it is not contrary to it. In addition, we have the immemorial usage. There cannot be a doubt.

WILLES, and ASHURST, Justices, were of the same opinion.

BULLER, Justice.—The custom does not require any precise form of proxy. On referring to the old form of proxies in the House of Lords, it will be seen that it was a condition annexed to the leave of absence, that the peer should appoint a proxy.

Judgment for the plaintiff.

¹ See 4 Inst. 13, Com. Dig. Parl. (D. 19), 1 Christian's Blackstone, 168 (n).

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*The KING v. STANLEY. *April 24.*

(Reported, CALDECOTT, 172.)

The KING v. The Justices of BEDFORDSHIRE. *April 25.*

(Reported, CALDECOTT, 167.)

SMITH, on the demise of JERDON, v. MILWARD. *April 26.*

A right of common cannot be reserved in an exception in a demise under the word "land." A right of common [whether appendant or appurtenant not stated in the case] cannot be severed from the land and converted into common in gross.

THIS was an action of ejectment, tried at Stafford, before NARES, Justice, when there was a verdict for the plaintiffs, subject to the opinion of the Court on a case which stated, in substance, as follows:

That the lands in question are parcel of a common called Ashwood Hay, in the manor of King's Winford. There were formerly within this manor three large commons, called Ashwood Hay, Wall Heath, and Pinsnett. In 1685, articles of agreement were made between the lord of the manor (Lord Ward) and the tenants. By these articles, the lord was to give up his right of warren over Ashwood Hay and Wall Heath, which were to be divided in allotments amongst the tenants, according to their respective interests, they paying eleven pence per acre yearly. The allotments were to be set out by metes and bounds, but not enclosed, and to be corn land when sown, and commonable at other times. The agreement was to continue for ninety-one years, with a clause, that the commoners, their heirs and assigns, and others who shall have the tenements for which the said commoners would have or claim a right of common, as thereunto belonging, are again to have and enjoy, &c. The common of Pinsnett was not included in the articles, but continued to be used as common, as before. The articles were confirmed, and the allotments made, under a decree of Chancery; and the term of ninety-one years expired on the 5th of April, 1776.

Edward Milward, seised in fee of a copyhold of inheritance held of the said manor, called Brochmore, demised *the same, according to the [*71] custom of the manor, in 1737, to Andrew Jerdon, his executors, &c., for ninety-nine years, "with all commons, hereditaments, rights, members, and appurtenances to the said farm and premises belonging," except to the said Edward Milward, his heirs, &c., "all lands in Ashwood Hay and Wall Heath in the said parish."

The plaintiff is administrator of the said Andrew Jerdon.

In the beginning of 1776, an act passed for enclosing Ashwood Hay and Wall Heath; and the commissioners assigned the land in question to the defendant Milward and the lessor of the plaintiff, in respect of a certain customary estate (describing Brochmore farm), "according to their several and respective estates, rights, and interests therein, in full satisfaction, for all rights of common belonging to them in, over, or upon the said common or waste lands in respect of the said estate."

The eleven pence per acre, payable to the lord by the articles of 1684, has always been paid by Milward. The whole of the lands in Ashwood Hay and Wall Heath were common, and used as such before the articles of 1684, and

were divided and allotted by those articles. The tenants of Brochmore constantly used to take common on Ashwood Hay and Wall Heath, in right of that farm, at such times of the year when the same was open and commonable, till the enclosure under the act of parliament; and from the 5th of April, 1776, when the articles expired, to the 7th of October in the same year, when the commissioners made their award, Ashwood Hay and Wall Heath were used as common by the occupiers of land in the parish of King's Winford.

The question is, whether the plaintiff is entitled to recover.

Plumer, for the plaintiff.—It is clear that a right of common belonged to this farm; but the question is, whether that common belongs to the lessor or the lessee; that is to say, whether the common is included in, or excepted out of, the demise. The demise is of the farm, with all commons and appurtenances, &c., so that on the demise it is clear that the commons would pass. But there is a clause, excepting to the lessor "all lands in Ashwood Hay and Wall Heath." In point of law, the lessor could not separate the common from the land to which it was appendant or appurtenant. The reason is obvious; the common is a right in *alieno solo*, *and is to be measured by the *levancy and couchancy* of the commonable cattle on the land [*72] to which it is appurtenant. In cases of surcharge, the remedy formerly was by writ of admeasurement of pasture; but if the right of common can be separated, that remedy will be at an end. It is like other rights, as of way, or *turbary*, which cannot be severed from particular houses or farms. Whatever was the intent of the lessor, he had not the power to sever this common. 1 Rol. Ab. 401. But supposing that the lessor had such power, the words he has used express no such intent. The demise conveys the common, and the exception reserves land. Common will not pass by the word land. It is *nomen generalissimum* for corporeal, but not for incorporeal hereditaments. Co. Litt. b. 1, c. 2, s. 4. Where technical words are not ambiguous, the Court cannot construe them otherwise than according to their legal import; not even in a devise, still less in an exception like the present.

Adair, Sergeant, contra.—The question arises only on the exception. It may be admitted that the words of the grant are sufficiently large. It is a rule applicable as well to deeds as to wills, that the intent must govern, if not contrary to the rules of law. It is said that the common cannot be severed from the land and converted into common in gross. It is true that common appendant cannot be severed even for a moment, or turned into common in gross. See *Musgrave v. Cave*, C. B., H. 15 G. 2, Willes, 322. But common appurtenant may be created at this day. Co. Litt. 122 a, Danv. Ab. 804, pl. 7, Br. Ab. Com. pl. 1. And the authorities show that common appurtenant for a certain number of beasts may be converted into common in gross. See *Drury v. Kent*, B. R., E. 1 Jac. 1, Cro. Jac. 15; *Bunn v. Channen*, C. B., M. 54 G. 3, 5 Taunt. 244. From the state of the common at the time of this demise, it appears that the intent of the lessor was to reserve it. He had nothing else in Ashwood Hay but this common, which at that time existed not in the shape of common, but was held by metes and bounds, when sown, subject to a right of common at particular periods of the year. If, by a legal subtlety, it is contended that, in consequence of the land again becoming strictly common by the expiration of the agreement, it is reunited to the demise, and that there is conferred upon the lessee what *it was never in the contemplation of the lessor to grant, [*73] the answer is, that now, by the allotment, the right of common is converted into land which may be severed, and that it was so at the time of action brought. With regard to the word "common," in the granting

part of the demise, it is satisfied by the common which passed in another estate.

This case has already been decided in the Court of Common Pleas, but with a variation in the statement of the circumstances. It was stated in the case there argued, that the common was appurtenant; whereas it does not appear here whether it was appendant or appurtenant. It was also stated there, that the tenant of the farm had never exercised any right of common over Ashwood Hay, whereas the contrary appears here. The Court of Common Pleas decided in favor of the present defendant.

Plumer, in reply, was stopped by the Court.

Lord MANSFIELD, after stating the case, said,—The question arises on the construction of the exception. On the one hand it is contended, that it means the qualified right of common under the agreement; on the other, that it means the original right of common which revived on the expiration of the agreement. It is to be observed, that at the particular periods of the year when the land was common, the lessee enjoyed the right of common, which distinguishes this case from that decided by the Court of Common Pleas. In fact, nobody but the tenant could enjoy the common belonging to the farm. It might be released, but it could not be transferred. The allotment, under the act of parliament, was given in lieu of the right of common, and for nothing else. The lessee was entitled to the right of common, and he is therefore entitled to the allotment.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—The word land properly means corporeal hereditaments, and shall be so taken, unless there be an express intent to extend the meaning. Here no such intent appears, and it is, therefore, unnecessary to say, whether, in point of law, if the intent of the parties had been to reserve the common, it might have been done.

Judgment for the plaintiff.

[*74]

*MANNING v. GIST.¹ April 27.

Policy on the ship *Elizabeth*, from Tortola to London, with warranty to sail with convoy for the voyage. The commander of the convoy sent a ship to bring up the merchantmen from Tortola (the usual mode of convoying ships from that place); but the ship so sent was not to form part of the convoy for the remainder of the voyage. The *Elizabeth* sailed with the ship so sent, but was lost before she joined the commander of the convoy. Held, that the warranty was complied with.

This was an action on a policy of insurance upon the ship *Elizabeth*, from Tortola to London, with a warranty to sail, with convoy for the voyage, on or before the 1st of August. The only question was, whether or not the vessel had sailed with convoy; and the following circumstances were proved at the trial: The *Cyclops*, Captain Robinson, was sent by Sir C. Douglas, the commander at St. Kitt's, to bring up the ships from Tortola, with orders, if they should get a certain way to the northward, to go straight for England. They sailed from Tortola; but the *Elizabeth*, being a bad sailer, fell to leeward several miles, and lost the convoy, and was afterwards captured while attempting to make the passage to England by herself. It was proved, that the usual way of convoying ships from Tortola was as in this case, the whole fleet not being able to get up to Tortola. The *Cyclops* was not one of the ships intended to form part of the convoy to Europe, but was only despatched by the commander to bring up the trade from Tortola, who were to join him in a certain latitude. It was contended at the trial, that the

¹S. C. Shortly reported, *Marshall*, Ins. 367, 2d edit.

Cyclops, not being to take the vessels all the way to England, was not a convoy for the voyage, and that therefore the warranty had not been complied with; but Lord MANSFIELD was of a different opinion, and the jury found a verdict for the plaintiff. A rule for a new trial having been moved for,

The *Solicitor-General* and *Wallace*, in support of the rule, contended, that the warranty had not been complied with. The Cyclops was not a convoy to Europe. The convoy meant was the general convoy, which the vessel never joined. Suppose that orders had been sent by a merchant-ship for the Elizabeth to meet the commodore; if she had actually joined him, that would have been a sailing with convoy, but not unless she joined, up to which time she does not come within the warranty.

Lord MANSFIELD.—This case is very clear. The warranty never specifies the force of the convoy, which is always left to government. According to the policy she is to sail *with convoy from Tortola; what constitutes the convoy, depends upon the usage. In fact, the fleet never go to [75] Tortola, but the commodore sends part of his force to bring the merchantmen to him at sea. That is the convoy from Tortola; there can be no other. He may send a ship that is to go on with him, or he may not, if the service required it. Government may relieve, and change the ships. The sailing orders are given by Sir C. Douglas. There is no doubt that the Elizabeth joined the convoy appointed by government for the trade.

Rule discharged.¹

¹ See *Audley v. Duff*, C. B., H. 40 Geo. 3, 2 Bos. & Pul. 111.

THE KING v. HARTLEY. May 1.

(Reported, CALDECOTT, 175.)

THE KING v. INHABITANTS OF BAGWORTH. May 1.

(Reported, CALDECOTT, 179.)

CROOK v. DOWLING.¹ May 1.

In an action for maliciously holding the plaintiff to bail, the declaration stated, that the defendant had sued out the writ which he had caused to be endorsed for bail, by virtue of an affidavit for that purpose filed. Held, that a copy of the affidavit was admissible in support of this allegation.

THIS was an action for maliciously holding the plaintiff to bail, tried at the Chelmsford assizes, before ASHURST, J. The declaration stated, that the defendant had sued out a *latitat*, which he had caused to be endorsed for bail, by virtue of an affidavit for that purpose filed. At the trial the plaintiff offered in evidence a copy of the affidavit to hold to bail, which the learned judge rejected, being of opinion that the original was the best evidence, and ought to have been produced. The plaintiff was accordingly nonsuited. *G. Bond* having obtained a rule for a new trial, on the ground that this evidence was improperly rejected,

¹ S. C. cited B. N. P. 14.

**Mingay* showed cause.—The copy of the affidavit is not evidence. [76] It has been said, that the affidavit, being in the nature of a record, cannot be taken away to be given in evidence; but the practice is otherwise. Every day affidavits are taken off the file by a judge's order, and are carried to different parts of the kingdom. In this case the action is for suing out the writ, and perhaps no evidence whatever of the affidavit was necessary; and there may be a new trial on that ground, but the copy of the affidavit cannot be evidence. [BULLER, J.—Affidavits are in fact carried down on security being given to the Clerk of the Rules.]

Erskine and *G. Bond*, *contra*.—The writ was offered in evidence, which was sufficient, and on that ground there must be a new trial. The writ proved the whole, being endorsed for bail by affidavit. [ASHURST, J.—I remember a doubt whether the affidavit was averred in the declaration; the averment being "by virtue of an affidavit filed," &c., I thought it was averred.] It was certainly not averred that the defendant made the affidavit; within the statute, 12 Geo. 1, c. 29, the affidavit may be made by others. The copy of the affidavit was offered in evidence only to show that an affidavit had, in fact, been made. *Cameron v. Lightfoot*, C. B., E. 18 G. 3, 2 W. Bl. 1190. [BULLER, J.—You must take it with the qualification in that case.] *R. v. James*, E. 4 W. & M. Carth. 220. [Lord MANSFIELD.—That cannot be law. *Bearcroft*.—The contrary was determined in *R. v. Morris*, E. 4 W. & M. Carth. 220. *Mingay* read a note of Peckham's of *Walter v. Butler*, tried before Lord MANSFIELD, at Guildhall, in 1779, where the copy of an affidavit was rejected in evidence, and the distinction taken between an affidavit in the cause and an affidavit in another case, according to the doctrine in *Cameron v. Lightfoot*.] The gist of the action was suing out the writ, and the copy of the affidavit was evidence that an affidavit made by some person was filed, the identity of the person not being in question. The original affidavit ought not to be removable; it is like a record, and it ought to remain on the file, in order to justify the officer who issues the writ. But, [77] even if removable, there are other documents partaking of the nature of records *which, though removable, may be proved by copies, as the original books of a manor, and proceedings in Chancery.

Lord MANSFIELD.—The uncertainty of the law of evidence is owing to mistaken notes, which have turned particular cases into general rules. Now the whole law of evidence consists in applying general rules to particular cases, for almost all evidence is admissible or inadmissible, according to the circumstances of the particular case. In perjury, notwithstanding the case in *Carthew*, I doubt whether the copy of an affidavit would be evidence, because the handwriting is an essential part of the case to prove the identity. With that view an order was made by the Court of Chancery that all defendants should sign their answers. In *R. v. Morris* the handwriting was the only proof of the identity, which was an essential part of the case; therefore, in indictments for perjury, I think that the original should be produced. It may be procured by an application to the Court, or to a Judge in vacation, who will order the officer to carry it down, or to deliver it.

But it does not follow from hence that the copy of an affidavit cannot in any case be received in evidence. Here the declaration alleges, that the plaintiff was arrested under a writ endorsed for bail, by virtue of an affidavit before that time made. The defendant was proved to have sued out the writ, and to have delivered it to the bailiff, endorsed for bail. That proved the whole case. The defendant cannot be permitted to say that it was endorsed without affidavit. Perhaps if it had been averred that the defendant made the affidavit it might have been necessary to produce the original. If the writ had not been endorsed, the copy would have been sufficient to prove the allegation that the writ issued by virtue of an affidavit.

WILLES, Justice.—In an indictment for perjury, the copy of an affidavit is not evidence, and in this case the original might have been necessary if it had been averred that *the defendant made the affidavit*; but as the declaration is framed, the copy is sufficient evidence.

ASHURST, Justice, was of the same opinion.

BULLER, Justice.—I have not found any case contrary to that in Carthew, but I am sure such must have occurred. Wherever identity is in question, the original must be produced. I am of opinion that the copy was sufficient here, but I also think that the writ would have done alone. The *en-
dorsement is an admission by the original plaintiff (the present de- [78]
fendant) that an affidavit was filed. Rule absolute.¹

¹ This case was referred to by Mr. Justice BULLER in *Webb v. Herne*, C. B., T. 38 G. 3, and his imperfect recollection of it appears to have misled him. He said it was only stated generally that “a writ was sued out, endorsed for bail, £—;” and he therefore distinguished it from that case, where the averment was “endorsed for bail by virtue of an affidavit filed of record.” The court, holding that this was a substantive allegation, which it was necessary to prove, and there having been no evidence of it beyond the writ, they were of opinion that the plaintiff was properly nonsuited. That case, therefore, is at variance with the opinions of the Judges in the present, which appears to rest upon sounder principles. In another case Mr. Justice BULLER held, that proof of the writ endorsed for bail was sufficient, without any evidence of the affidavit. *Rogers v. Ilcombe*, 2 Esp. Dig. N. P. 38. The very point decided in the principal case came before the Court of Common Pleas, in *Casburn v. Reid*, H. 58 G. 3, 2 B. Moore, 60 (an action for an escape), when, on the authority of a note of Crook v. Dowling, in Buller’s Nisi Prius, p. 14, last edit., they held, that an office copy of the affidavit was sufficient; and they recognised the distinction between the common averment and an allegation that the affidavit was made by the party himself. The averment, “by virtue of an affidavit,” &c., is superfluous, and need not be inserted. *Wilcoxon v. Nightingale*, C. B., H. 8 & 9 G. 4, 4 Bingh. 501. See also *Sharpe v. Abbey*, C. B., M. 9 G. 4, 5 Bingh. 193.

In general, in civil proceedings, copies of answers in Chancery are sufficient. *Lady Dartmouth v. Roberts*, B. R., M. 58 G. 3, 16 East, 384; *Hennell v. Lyon*, B. R., M. 58 G. 3, 1 B. & A. 182; *Ewer v. Ambrose*, B. R., E. 6 G. 4, 4 B. & C. 25, 6 D. & R. 127, 8 C.; *Dartnell v. Howard*, cor. Abbott, C. J., Ry. & Moo. 169. But in order to render the copy of an affidavit admissible, as against the party making it, some evidence must be given to connect him with it, as by proof of his signature, or by showing that he has used it. *Rees dem. Howell v. Bowen*, Exch. T. 6 G. 4, M. & Y. 883.

Although the case of *R. v. James* was denied by Lord MANSFIELD to be law, and although BULLER, J., stated that there must be cases to the contrary, none such appear in the books. As stated in Carthew, there was no evidence to connect the defendant with the affidavits; but in the report in 1 Shower, 397, the Court said, “The affidavit being of the defendant in the cause, and used by him, upon motion in Court, it’s enough, otherwise if not so; but a copy of an affidavit only produced against a man, without proof that he made it, used it, or was concerned in the cause, would be insufficient.” In this view the case was recognised by HULLOCK, B., in *Rees v. Bowen*, supra.

*MAYNE and Another v. WALTER. May 3. [79]

A Portuguese ship was insured and warranted neutral. She carried an English supercargo, a fact which was not known to the underwriter, and which was contrary to a French ordonnance. On this ground she was captured, and condemned as a prize. Held, that the underwriter was liable.

THIS was an action on a policy of insurance. The declaration stated, that the plaintiffs, on the 26th of April, 1781, made a policy of insurance on the ship called the N^o. S^o. de Paidade et San Francisco, a Portuguese, at and from Madeira, to the ship’s port or ports of discharge in Jamaica, with liberty

¹ S. C. Park Ins. 263, 6th ed.

to touch and call at any of the West India islands, valued at £1805, at 12 guineas per cent.; to return £3 per cent. for what should be discharged at the Windward or Leeward Islands; and the ship was warranted free from British captures in port and at sea.

That the defendant underwrote the policy for £150.

The plaintiffs aver, that the said ship was a Portuguese ship, and that one Joan Francisco de Frietas Esmeraldo was interested in the said ship and her freight: that the said ship was captured, in her voyage, by certain subjects of the French king, by reason whereof the defendant became liable to pay to the plaintiffs the sum insured by him.

There were other counts for money paid, and money had and received, to the plaintiffs' damage of £200.

The defendant pleaded the general issue, *non assumpsit*.

The cause came on to be tried at the sittings after Hilary Term, 1782, at Guildhall, before Lord MANSFIELD, when the jury found a verdict for the plaintiffs, damages £131 2s., costs 40s., subject to the opinion of the Court on the following case.

That the ship insured was the property of Joan Francisco de Frietas Esmeraldo (named in the declaration), of the island of Madeira, a Portuguese.

That Messrs. John Searle and Co., of the island of Madeira, who were agents for the said owner in ordering the insurance in question, were part owners of the cargo loaden on board her, and knew that Robert Thompson, an Englishman, who was also interested in the cargo, was to go as supercargo on board the said ship; but this fact was not communicated to the defendant.

[*80] That the ship was taken, on her voyage, by a French *privateer, and condemned (setting out the sentence of condemnation), by reason that the said Robert Thompson was supercargo on board.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover in this action?

Piggot, for the plaintiffs, contended that the having an English supercargo on board did not make the ship other than neutral property.

Hayworth, contra, said that this was a new case: that the question was, what was the import of the warranty, "that the ship was a Portuguese ship?" This, as he contended, was, "that the ship should receive such protection during the passage as would belong to a neutral ship." Here, by an act imputable to the insured, the ship is captured and condemned; being condemned on the single ground that she had an English supercargo on board. All belligerent nations make rules for the navigation of neutral vessels. By a French ordonnance of 1778 (similar to another in 1756), it is provided that the supercargo, and certain other officers mentioned, must not be natives of a country hostile to France; and that if they be so, the ship shall be deemed lawful prize. The French court, acting on this ordonnance, condemned the ship as enemy's property. To whom, then, is this loss attributable? Certainly not to the underwriter, who was ignorant of the fact, with which the party who made the insurance was acquainted. The ship, by the act of the insured, was not a neutral ship for the purpose of being protected.

Lord MANSFIELD (stopping Piggot).—It does not appear that either of the parties knew of this ordonnance, which is arbitrary, and contrary to the law of nations. By the law of nations there is no difference between enemy's property and an enemy's subject being on board. The parties are both innocent, and the underwriter who takes the risk ought to be the sufferer. As to any treaties between France and Portugal, not a word is said about them. Neither party seems to know anything about them, and yet the whole case turns upon them.

Judgment for the plaintiffs.¹

¹ See *Barzillai v. Lewis*, T. 22 G. 3, post; and *Salucci v. Johnson*, H. 25 G. 3, post.

*LE CRAS v. HUGHES. May 3.

[*81]

A squadron of ships of war, assisted by land forces, having captured two Spanish register ships, Held, that the officers and crews of the squadron have an insurable interest in the ships captured, under the prize act 19 G. 3, c. 67, before condemnation. An average loss opens a valued policy.

THIS was an action on a policy of insurance dated the 29th of December, 1779, at and from St. Fernando de Omoa to London, on goods, &c., on the ship St. Domingo, a Spanish prize to the squadron under Captain Luttrell. The cause was tried at Guildhall, before Lord MANSFIELD, and a verdict was found for the plaintiff, subject to the opinion of the Court on a case stating,

That Captain John Luttrell, commanding a squadron of his majesty's ships, consisting of the Charon, Lowestoffe, Porcupine, Racehorse, and Pomona, and Captain W. Dalrymple commanding some land forces, proceeded together, during the present war with Spain, to take two Spanish register ships—of which the St. Domingo, mentioned in the declaration, was one—lying afloat, at anchor, in the harbor of St. Fernando de Omoa, under the protection of the fort there; which fort, ships, and their cargoes, were a joint capture to the said squadron and land forces. That the defendant underwrote the policy stated in the declaration for £500, at a premium of 20 guineas per cent. That the ship St. Domingo sailed, with convoy, on the insured voyage; and that the said ship, and great part of the property on board her, were lost, by the perils of the seas, on that voyage. That the interest intended to be covered by this insurance was that of the officers and crews of the said squadron.

The question for the opinion of the Court was, "Whether the officers and crews of the said squadron had an insurable interest in the said ship St. Domingo and her cargo."

Erskine, for the plaintiff.—The first clause in the prize act, 19 G. 3, c. 67, is the only material one. The objection is, that this being enemy's property, and vesting in the Crown, and not being divested and given to the captors by any of the prize acts, does not confer any insurable interest. It was admitted, in *Lindo v. Rodney*, B. R., H. 22 G. 3, ante, vol. ii. p. 613 (n.), that the property vests in the Crown, but not till condemnation. The questions, then, *will be, 1. Whether the insured had an absolute vested interest; 2.

Whether, supposing the case not to be within the prize act, possession [*82] did not give the captor an insurable interest. 1st. This comes within the prize act; and the junction of persons not entitled shall not deprive those who were entitled. The French prize act, 19 Geo. 3, c. 67, after reciting the proclamation of hostilities, gives the captors the property in all ships, &c., taken from the French. This was followed by a declaration of hostilities against Spain, and (parliament not sitting) a proclamation was issued for vesting the property in the captors; after which the Spanish prize act passed, 20 G. 3, c. 23. The proposition intended to be insisted on, upon the other side, is, that the land forces being jointly concerned in the capture, takes it out of the statute. It does not appear, from the case, that this was not a mere sea-capture, and that the soldiers were not on board. But it may be admitted that they were landed. In fact, the troops landed and silenced the fort of Omoa, and then the ships took the register vessels. In case of a prize taken by a commissioned ship and a non-commissioned ship, the practice of the Admiralty is to adjudge the prize to the commissioned ship, and to give a share to the non-commissioned ship *pro opere et labore*. Suppose the St. Domingo had

¹S. C.; but not so fully reported, and without the arguments. Park on Ins. 358, 6th ed.; Marsh. Ins. 108, 2d ed.

been driven on shore, and the soldiers and sailors together had boarded her, shall that accident revert the ship in the Crown? In the case of *Louisbourg*, in the war before the last, two French ships sailed into the harbor, being decoyed by French colors, and were taken by the men-of-war. The Court of Admiralty adjudged it to be a joint capture by land and sea forces; but, on appeal, the Privy Council reversed that sentence, and adjudged it a sole prize to the fleet. This case is not cited to show that here there was a sole capture, but to prove, that when the land forces made their claim, it was never supposed that the capture belonged to the Crown. But, 2. Supposing this case not to come within the prize acts, yet the legal seizure, and possession, and the special property arising from the expected bounty of the Crown, confer an insurable interest. It would clearly have been a good insurance before the statute 19 G. 2, c. 37. The preamble of the statute sets forth the object of the legislature in passing it, to prevent "a mischievous kind of gaming [*83] *under pretence of insuring." This policy does not come within the description of those mentioned in the enacting part of the statute. The interest there mentioned does not mean an indefeasible property, it means such an interest as a person may have in property which he has a reasonable expectation of acquiring. Here the assured had an actual special property—such a property as would have sustained trover, or would have been sufficient to maintain an indictment in case of larceny. That special property remained in the captors until the Crown came in, and, by prosecuting to condemnation, divested the property out of the captors; but the defendant produced no such condemnation. Suppose a neutral ship is taken which cannot be condemned, the captor has a right to insure, because he is liable in damages, and is interested in the preservation of the vessel. Suppose again, that a third person, after setting up a claim to a vessel insured, releases his right to the assured, shall the insurer say, "If that suit had gone on, you would have been found to have no interest?"

Scott, contra.—Since the statute 19 Geo. 2, contracts of insurance are contracts of indemnity. The party insured must have an interest recognised by law, and must show a damnification. It is admitted on all hands, that all property taken by the king's military and naval servants becomes, by the capture, and before condemnation, the property of the Crown. This was doubted, and formerly held otherwise; but it is now completely settled, both here and in other countries. The insured must show an interest in one of three modes: 1. By grant from the Crown, by some instrument whereby the Crown signifies its pleasure, or by act of parliament; 2. By showing a reasonable expectation of reward, from the state giving an inchoate right amounting to an insurable interest; 3. By proving legal possession. It will be more convenient to consider the second question in the first instance. This is not an interest in a legal sense, and within the meaning of the statute 19 Geo. 2. There is no legal right for which there could be a remedy by suit. It has been held, that persons who are within the prize acts may grant before condemnation, because the condemnation has relation to the time of the capture; *Morrrough v. Comyns*, C. B., E. 21 G. 2, 1 Wils. 211; but the right [*84] of a captor under the prize acts is very different from the right set up here, which consists merely in expectation. That expectation may be disappointed: and though an expectation from charity or generosity is an interest in some sense, yet it is not so in contemplation of law. There are occasions on which it might be proper to withhold such a gift, as in cases of public emergency. If the Crown has not granted by proclamation, or act of parliament, which is here assumed, it may yet grant the whole to the army. Mr. Luttrell may perhaps have sold his expectation for a large sum, but that will not convert it into a legal interest. The son of a merchant who is dying

has no insurable interest in his father's property. There is no interest in law, however contingent, which may not be vindicated by suit, or the evidence of which may not be perpetuated by a court of equity.¹ Could such a bill have been maintained by Captain Luttrell? Or if he had become bankrupt, had he any interest which would have passed to his assignees? To hold possibilities like this to be insurable would let in unlimited gaming. If the son might insure, why not the grandson? There would be no end of trials on reasonable expectations. It would be mischievous, too, in another point of view, as a temptation to destroy the ship and cargo. Suppose the captors heard that the Crown meant to make a different disposition, it would be their interest to destroy her. In the case of *Lowry v. Bourdieu*, B. R., M. 21 G. 8, ante, vol. ii. p. 468, the interest was held not to be insurable, though, in common apprehension, there certainly was such an interest. The next question is, Had the captors any interest by grant from the Crown? The word "soldiers," used in the proclamation and prize acts, means soldiers on board, and under the command of a naval officer, which was not the case here. A joint military and naval force is not intended by the prize acts; and the capture, therefore, was made by a class of persons neither at the time of the capture nor of the loss the object of the bounty of the Crown. If the soldiers had been usually on board, and under the command of sea-officers, their being occasionally on shore might not bar them; but, in this case, the forces were distinct, and under different officers. [Lord MANSFIELD.—It is determined, in several cases, that soldiers on board *means such as are the complement of the ship.] The case of *Louisbrough* was not a joint capture, [*85] although the governor threw out the flag. No one there had an interest to claim for the Crown. The last point is, whether the possession of the insured was sufficient to constitute an interest. In general, as against a third party who has no right, a person in possession may maintain an action. The third party, having no title himself, cannot object to that of the person in possession. But the underwriters here stand in a different situation: they may lose the value of the property, while the wrong-doer can lose nothing. Captain Luttrell's possession is merely that of a servant of the Crown. Can the Court call that a property? Would he have been liable in case the vessel had been lost on the passage? Still, it is said, there may be cases in which he would be liable, and the case of a neutral ship has been mentioned. But suspicious circumstances are considered, by the Admiralty, as an excuse for taking neutral property, so as to prevent the recovery of costs and damages; and a loss in the mean time, without blame, will not fall on the captor. [Lord MANSFIELD.—It must depend on the question of neutral or not neutral.] The case of a ship found at sea comes nearer. The finder has a property against all but the owner; but can he indemnify himself against a loss which in fact the owner sustains? The insurance might have been in the name of the Crown; but Captain Luttrell has suffered no loss in a legal sense, and can claim no indemnity.

Erskine, in reply, was stopped by the Court.

Lord MANSFIELD.—The defendants have set up a most unfavorable defence. At the time of the insurance being effected they were as well acquainted as Captain Luttrell with all the circumstances of the case; they knew that Captain Luttrell had no intention whatever of effecting a gaming policy, and yet they have not even offered to return the premium. At the same time, the plaintiffs have done wrong in defending a good cause like a bad one, by a collusive condemnation. The question, whether the sea-officers had an insurable interest, depends, 1. On the prize act and proclamation; or,

¹ See the observations of Lord ELDON in *Lucena v. Craufurd*, Dom. Proc. 2 Bos. & Pul. N. R. 824.

2. Putting the act and proclamation out of the case, on the possession, and on the expectation, warranted by almost universal practice. The first is the strongest ground, because it gives an interest which will support an action. The whole that is taken is given to the navy. Is it necessary that they should solely take? Suppose *the British fleet acting with an allied [*86] fleet, and that prizes are taken, can it be said that the act gives nothing because they cannot take all? So, where captures are made by ships of war and privateers, it rests with the admiralty to apportion the prize, yet what remains for the ships of war is within the act. Where ships of war, and ships not commissioned, make a capture, the navy shares notwithstanding the *droit* of Admiralty. It is a most extraordinary proposition, that if a ship make the capture alone she shall have all, but that if she has a little assistance she shall have nothing. Where soldiers assist, their right may be doubtful; but that will not take away the right of the navy. If this be correct, there is an end of the question. But, 2. Is the expectation a sufficient interest? Wherever a capture has been made, since the Revolution, by sea or land, the Crown has made a grant: there is no instance to the contrary. Then, is the contingency of the ship's coming home a risk which the captors may provide against? It has been properly said, that since the statute of Geo. 2, insurance is a contract of indemnity. An interest is necessary, but no particular kind of interest is required. Master Holford's insurance was not a legal interest; but in *Grant v. Parkinson*, B. R., M. 22 G. 3, ante, p. 16, the profits of a voyage, though not a vested interest, were held insurable. An agent of prizes may insure his profits though they are in contingency. See *Crawford v. Hunter*, B. R., M. 39 G. 3, 8 T. R. 23. Such an insurance prevents risks from neutral claims; it also guards against a loss arising from the disappointment of an expectation which hitherto has never been disappointed. On either ground I think the policy a good one.

The next question is as to the mode of computing the loss. The soldiers have a share by agreement, which reduces the share of the navy to much less than the sum insured. I thought, at first, that this resembled the case of *Lewis v. Rucker*, B. R., E. 1 G. 3, 2 Burr. 1171; which we think right whenever the goods are described as by hogshead, &c. The constant usage has been, where it is a total loss to pay the whole; but where it is an average loss, it opens the policy. We have found the original of this custom; it arose from a case at Guildhall, M. 21 Geo. 2, *Erasmus v. Banks*, before [*87] Lord Chief Justice LEE, where it was agreed that the word valued *is an estoppel on both parties in case of a total loss, but not in case of a partial loss. See *Parks Ins.* 291, 6th ed. Another case was cited where the same point was ruled. This appears to us to be a reasonable rule, and therefore we are of opinion that the computation must be made on the real interest on board.

Postea to the plaintiffs.¹

¹The authority of this case was fully recognised by seven of the Judges in the case of *Lucena v. Craufurd*, Dom. Proc. 2 Bos. & Pul. N. R. 294. "The case of *Le Cras v. Hughes*, was a case of mere expectation, and the circumstances were not near so strong in favor of the assured as the circumstances of this case. The doctrine there laid down by that expositor of marine law, Lord MANSFIELD, twenty-four years ago, has been recognised as law in subsequent cases; and if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds. The interest of the captain, in *Le Cras v. Hughes*, was not certain, yet it was all but certain that the property would be given according to the custom of the Crown in such cases. Captain Luttrell had an interest for which he would not have taken £20,000; and it

would be a strange thing that he should not be allowed to insure that interest against the perils of the sea. There is a decision of a foreign Court of Prize very nearly corresponding with *Le Cras v. Hughes*, in 2 Valin. article 15, fo. 57. By the French ordinance, future profits were prohibited to be insured. The author, in commenting on the article says, 'It is not a future profit to insure a prize already taken, although the prize be not acquired with certainty until it be brought within the ports of the realm,' and then cites an adjudication by the parliament of Aix." In *Routh v. Thompson*, B. R., T. 49 G. 3, 11 East, 483, Lord ELLENBOROUGH made the following observations upon the principal case. "In *Le Cras v. Hughes*, which was cited in argument, part of the captors at least, viz. the seamen, were considered as having a vested right in the ship and cargo, as prize, to a certain extent; and the Court decided, that the capture was within the prize act, and the captors had therefore a right vested by that act. It is true that another question (which Lord MANSFIELD considered as by no means the strongest) was raised—whether possession and the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounted to an insurable interest; and the Court gave a decided opinion that it did. But what fell from Lord ELDON in *Lucena v. Craufurd*, 2 New Rep. 323, is materially at variance with the decision of the Court of K. B. on that point. However, if the authority of that case were unquestionable upon both the points decided, yet what was held by the Court of K. B., in respect to a contingency of the *nearly certain kind which was then under consideration, would afford no rule to govern a case circumstanced like the [88] present."

With regard to the insurance of the interest of the Crown, or of the captors, in case of capture, see *Routh v. Thompson*, B. R., T. 49 G. 3, 11 East, 428; *Stirling v. Vaughan*, B. R., M 50 G. 3, 11 East, 619; *Routh v. Thompson*, B. R., H. 51 G 3, 18 East, 274; *Craufurd v. Lucena*, 3 B. & P. 75, 2 New Rep. 269; *Park Ins.* 861, 6th edit., S. C.

LOWNDES v. LEWIS.¹ May 4.

A clergyman having a living of less than £150 per annum, is not qualified, under stat. 5 Anne, c. 14, to kill game.

THIS was an action of debt for penalties under the game laws, 5 Anne, c. 14, s. 4, for keeping and using a grayhound, tried at the Oxford assizes, before HEATH, J. The plaintiff made out a case entitling himself to two penalties. The defendant insisted on qualification as vicar of a living of the clear yearly value of £100. A verdict having been found for the plaintiff, with leave for the defendant to move to enter a non-suit, a rule to that effect was granted.

Huworth and *Bower* showed cause.—The question which arises on the clause in the statute 22 and 23 Car. 2, c. 25,² is, whether, in order to bring the qualification within that act, a clergyman must have a living of £100 or £150. If any doubt arises on the clause, it is removed by referring to the prior statutes of 1 Jac. 2, c. 27, s. 3, and 7 Jac. 1, c. 11, s. 7, where the distinction is drawn between an estate of inheritance and an estate for life. The repealed statute, 13 Ric. 2, c. 13, makes a difference in the qualification for killing game between spiritual and lay persons, requiring that a clergyman should have £10 a year, which at that period almost amounted to a prohibition. That statute being repealed, and there being no mention of spiritual persons in the later statutes, it does not appear that spiritual persons are in any case qualified. At all events, not having *an [89]

¹ S. C., Cald. 188.

² By this statute, s. 3, "All and every person and persons not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of £100 per annum, or for term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of £150 (other than the son or heir-apparent of a squire), are hereby declared to be persons by the laws of this realm, not allowed to have or keep," &c.

estate of inheritance, they are only qualified like persons having an estate for life, where it amounts to £150. Com. Dig. Justice of the Peace, 71. It cannot be said that a rector or vicar has the absolute fee, though it is otherwise with regard to bishops and abbots. He has only the fee for some special qualified purposes for the benefit of the church. That he has not the absolute fee, appears from his inability to maintain a writ of right—the writ of *juris utrum* being the highest writ he can maintain. The real question is, whether the words of the statute, as to the term of life, relate to the prior or the subsequent part of the clause.

Adair, Serj., contra.—The act cannot be construed so as to throw the words “for term of life” into the clause of leases. The distinction between freehold and leasehold estates is clear and well known; and when there is an expression in an act of parliament which coincides with this well-known distinction, such distinction will be adopted. The argument on the other side goes to this—either that a benefice is no qualification, or that it is a qualification to the amount of £100. If necessary, it might be contended that a parson has something more than an estate for life. It is to him and his successors, instead of to him and his heirs. It is as great an estate as any corporation can have.

Lord MANSFIELD.—To make sense of the act we must reject the word “having.” If we do not, persons having leases for ninety-nine years are disqualified.¹

WILLES, Justice.—I have some doubts. It has always been understood that a clergyman having £100 a-year is qualified; and it is a rule of construction always adopted in doubtful cases, that the usage shall govern.

ASHURST, Justice.—I have no doubt at present. The act, as it stands, is nonsense. We must either add the word “not,” or reject the word “having.” If you reject that word you make the statute clear. I think the defendant was not qualified.

BULLER, Justice.—I think there is no doubt. The statute of Charles, as it stands, is nonsense. In adding or rejecting it is necessary to recur to [*90] former acts, which have *great weight in construing a statute in *pari materia*. Leaving out the word “having,” makes the statute clear.

Rule discharged.

¹ For instance, “Every person not having an estate of inheritance or for life, or having a lease for any term of years, is declared to be a person, by the laws of this realm, not allowed,” &c.—Note by Mr. CALDECOTT.

COLMAN v. GODWIN.¹ May 4.

Words imputing a crime are actionable, although they describe it in vulgar language, and not in technical terms.

THIS was an action for words charging the plaintiff with sodomitical practices. The declaration contained several counts, one of which, reciting that there was a suspicion of one Hooper being guilty of sodomitical practices, stated a colloquium about him and the plaintiff being guilty of such practices, and that in that discourse the defendant spoke the following words: “I have seen Colman go into Hooper’s house and stay there all night, instead of going home to his wife.” *Innuendo*, that the plaintiff had been guilty of sodomitical practices with Hooper. The jury found a verdict for the plaintiff with £500 damages; and the defendant having moved in arrest of judgment,

Lee, S. G., *Wilson*, and *Piggot*, showed cause.—It has been long held

¹ S. C. from the MS. of GRESS, C. J., 2 B. & C. 285 (n).

that the sense of the words is a matter to be left to the jury; it was properly so left in this case, and they have found that the words were spoken with the meaning attributed to them by the plaintiff. The most innocent words may be spoken in such a manner as to be actionable. The finding of the jury is conclusive, be the words what they may, otherwise there is an end of the office of an *innuendo*.

Wallace, Bearcroft, and Baldwin, contra.—The words themselves must afford a strong suspicion of the sense put upon them by the *innuendo*; and the *innuendo* will not carry the meaning of the words any further, or render them actionable, when without the *innuendo* they would not be so. *King v. Bowen, B. R., E. 19 Jac. 1, Hutt. 44.* Actions of this kind are only maintainable where the words imply a criminal charge: but no indictment would lie for “sodomitical practices.”

Lord MANSFIELD.—It is objected that the law knows no such crime as sodomitical practices; but the real question is, whether the words spoken do not, in vulgar parlance, signify *an offence which in law is termed an assault with intent to commit sodomy. The colloquium renders this [*91] plain. All words depend for their meaning on the subject-matter, and that is to be left to the jury.

WILLES, Justice, of the same opinion.

ASHURST, Justice.—I am of the same opinion. The effect of the words on the hearers is what is to be considered. The determinations in the old books are a disgrace to the law.

BULLER, Justice.—Could these words bear the meaning that the defendant intended to impute sodomy? They certainly may. The meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense. Rule discharged.¹

¹ The office of the *innuendo* is, in fact, only to connect the libel with the introductory averments, as in the present case. It cannot extend the meaning of the words, nor can it explain them unless by reference to the introductory matter. See *Goldstein v. Foss, B. R., H. 7 & 8 G. 4, 6 B. & C. 154; 4 Bingh. 489, 1 Saund. 243 (n).* The rule that words are to be taken in *mitiori sensu* has been long abandoned. *Woolnoth v. Meadows, B. R., M. 45 G. 3, 5 East, 468; Roberts v. Camden, B. R., M. 48 G. 3, 9 East, 96.*

The KING v. WHITE and ELING, Overseers, &c. May 4.

(Reported, CALDECOTT, 183.)

POLE v. HORROBIN.¹ May 7.

Debt on bond conditioned to pay £50 in case defendant should not procure J. H., then impressed, to appear and deliver himself whenever he should be called upon. 1st plea: That J. H. was not called upon, &c. 2d plea: That J. H. was unlawfully impressed; and that it was unlawfully agreed between the plaintiff and J. H., that the plaintiff should discharge J. H., who shall pay as a gratuity, &c.; and that defendant, at the request of J. H., became bound for the payment. Replication to first plea: That the plaintiff called upon and required the defendant to procure J. H. to appear. Special demurrer thereto, and general demurrer to 2d plea. Held, that both the 1st and 2d pleas were good.

DEBT on bond.—Plea craves oyer of the condition, which was for payment of £50, “in case the defendant should not procure John Hadwen Cooper, then impressed, &c., to appear and deliver himself to the plaintiff

¹ S. C. 9 East, 416, partially reported.

[*92] whenever he should *be called upon;" and pleads, 1. That J. H. was not ever called upon to appear and deliver himself to the plaintiff, according to the form and effect of the said condition; 2. That J. H. was not liable to be impressed by any law, &c.; and, having been unlawfully impressed, the plaintiff was unwilling to discharge him unless he would agree to pay, &c., and would procure the defendant to become bound; and that it was unlawfully agreed that the plaintiff should discharge J. H., and that J. H. should pay, &c., as a gratuity and reward, &c.; that defendant, at the request of J. H., did become bound for securing the payment, &c., corruptly and unlawfully demanded, &c.; by virtue of which said several premises, the writing obligatory, so made as aforesaid, was and is void in law, &c. 3d Plea, setting out the impress warrant, by which the plaintiff was directed to take no money, &c., for sparing, exchanging, or discharging, &c.; that it was unlawfully agreed that the defendant should make such bond, in consideration of the plaintiff's discharging J. H., &c.; that the bond was in fact made, and J. H. discharged, contrary to the duty of the plaintiff, and in disobedience of the warrant, by virtue, &c. Replication to first plea:—That the plaintiff called upon and required the defendant to procure J. H. to appear, &c. General demurrer to the second plea. Replication to third plea, traversing the consideration alleged. Demurrer to replication to the first plea; and shows for cause, that the replication neither confesses, nor avoids, nor denies the matter alleged in that plea, viz., that J. H. was never called upon. Joinder in demurrer to the second plea. Rejoinder to replication to the third plea, taking issue on the traverse. Joinder in demurrer on demurrer to replication to first plea.

Wood, for the plaintiff.—There are two questions on these demurrers: 1. Whether it was incumbent on the plaintiff to call on the impressed man to surrender, or to call on the defendant to surrender him; and 2. Whether the defendant can be permitted to controvert the legality of the man's impress.

The condition of the bond is, that the defendant shall procure *Cooper*, the impressed man, to be delivered up whenever he shall be called upon. The wording is inaccurate and ambiguous; but the meaning must be, that the [*93] defendant, and not the impressed man, is the party to be *called upon. But supposing the words should relate to the impressed man, they still cannot mean that he should have personal notice, but merely signify "whenever there shall be occasion for him to appear."

The objection to the second plea is, that it is inconsistent with the condition of the bond; and it is a rule of law that no one shall be permitted to aver contrary to the condition of his bond. *Jenkins*, 166; *Foden v. Haines*; B. R., E. 6 W. & M., Carth. 300. *Downing v. Chapman*.¹ [BULLER, J.—That case was determined more on the form than on the substance of the plea. Three judges were against GOULD, J., on the ground that you cannot aver a different consideration from that which is stated. *Wallace*, A. G., said, that the proceedings in *Downing v. Chapman* were stayed on the authority of *Collins v. Blantern*, C. B., E. 7 Geo. 3, 2 Wils. 347. See 9 East, 421.] A man is estopped from controverting a fact which he has admitted by his deed. *Paramoure v. Durang*, B. R., M. 37 & 38 Eliz., Moore, 420; *Germin v. Randall*, B. R., H. 1 Jac. 1, Noy, 79; *Hart v. Buckminster*, B. R., E. 24 Car. 1, Alleyne, 52; *Salter v. Kidley*, B. R., M. 1 W. & M. 1, Show. 59; *Atkinson v. Coatsworth*, B. R., E. 8 Geo. 1, 1 Str. 512. Here, on the face of the condition, it appears that *Cooper* was *impressed*, which, *ex vi termini*, signifies a legal imprisonment. If not legal, why was it stipulated that he should return? But supposing that it does not mean a legal impress, it is still

¹ C. B., M. 6 Geo. 3, cited 9 East, 414. See *Id.* 421. Error was brought, but the suit was not prosecuted.

immaterial. If illegal, Cooper had a proper remedy; and if he does not think fit to avail himself of the illegality, it shall not be permitted to a third person, who has undertaken that Cooper shall return, to set up the illegality for his own protection.

Law, contra.—The first question is, Whether the calling upon the defendant is a virtual calling upon the impressed man. The Court will not put a meaning upon a deed different from that which it exhibits on the face, nor construe it liberally to occasion a forfeiture. The calling upon the impressed man is made a condition precedent; and, however difficult, it becomes the business of the party who has entered into the condition. Conditions precedent can be *vacated only in three ways: 1. Where the act becomes naturally impossible; 2. Where it becomes impossible by operation [*94] of law; and 3. Where it becomes impossible by the act of the other party.

However difficult a condition may be, yet, if undertaken, it must be performed. Here the plaintiff has stipulated that there shall be a personal calling upon of the impressed man, and that stipulation must be performed. The calling upon the impressed man means a personal request. *Gruit v. Purnel*, B. R., M. 8 Car. 1, 5 Vin. Ab. 207. But supposing the calling upon the defendant to be a virtual calling upon the impressed man, still it is not well alleged; for the replication should have been, that the plaintiff called upon the impressed man; and upon an issue taken on that allegation, the calling upon the defendant would have been evidence.

Upon the demurrer to the second plea, it is said, that nothing can be averred against a specialty to contradict it; that the defendant himself was under no restraint, and that *duress* therefore is no plea, according to *Huscombe v. Standing*, B. R., T. 5 Jac. 1, Cro. Jac. 187. In the present case, however, it appears upon the pleadings that the condition is illegal; for it is either that the man shall deliver himself up to an illegal imprisonment, or, supposing the imprisonment legal, then the bond was given for procuring the enlargement of the man from a legal custody, and is therefore bad. *Collins v. Blantern* has overruled *Downing v. Chapman*. [BULLER, Justice.—It is strange that it should have that effect, when the Judges profess to retain their former opinion.] Whenever the bond has the effect of bringing about an illegal purpose, that purpose may be shown in pleading, and will vacate the bond.

Wood, in reply.—If the condition of this bond can be construed in two modes, the one making it legal and the other illegal, the Court will adopt that interpretation which supports its legality. It is not illegal to entrust an impressed man to another person for a time. It is not a release and discharge of the man; it is merely humanity to the man and to his master. The stipulation in the condition is, that the man shall return to his service, a stipulation perfectly legal. *Collins v. Blantern*, relied upon by *the other side, admits the authority of *Downing v. Chapman*. [*95]

LORD MANSFIELD.—The demurrer to the replication to the first plea turns upon the point, whether the impressed man has been required to return. The matter brought before the Court by the replication is, that the defendant was required to procure the man to appear. This is a case of forfeiture, and must be construed strictly. The condition is, that the defendant shall procure the man to appear whenever he shall be called upon. There must, therefore, be two notices: first, the impressed man must be required, and then the defendant must be required to procure him. I think this demurrer right.

The second point is of more consequence. Some perplexity exists as to averring against a condition; but there cannot be such an absurdity as that a man should have a legal defence and should not be able to show it. Whatever is a defence at law may be pleaded against a bond, and whatever would

be a defence in equity is a defence at law. It is not inconsistent with the bond. It only states that the bond was made under circumstances which render it void. The doctrine is simply this: you shall not by parol evidence impeach the written agreement on account of the danger of perjury. But when the agreement is admitted, you may show other circumstances which make it illegal, but do not contradict the bond. Here the defendant says, "I signed the bond because the man was illegally impressed." *Impressed* does not mean *legally* impressed. Consistently, therefore, with the condition of the bond, the defendant may say that the man was illegally impressed. The bond, on the face of it, is almost illegal. How dare an officer, when a man is impressed, let him go? How can he know when his services will be wanted? It is like a sheriff letting a prisoner go. The demurrer admits the second plea to be true, and that plea is a good plea.

BULLER, Justice.—With regard to the demurrer to the replication to the first plea, I think the observations of Mr. *Law* are incorrect. I think it right to state the demand as it was, and not to let it go to trial on a general demand on the impressed man, when the facts may be stated so as to take the opinion of the Court on demurrer, whether they in law amount to the demand required by the bond.

[*96] Lord MANSFIELD directed the defendant's attorney to *inform the Lords of the Admiralty that this cause had been before the Court.
Judgment for the defendant.¹

¹ This case was recognised in *Paxton v. Popham*, B. R., E. 48 Geo. 3, 9 East, 408. So in *Doe dem. Small v. Allen*, B. R., H. 39 Geo. 3, 8 T. R. 147, it was held, that parol evidence might be given of questions asked by the testator at the time of executing his will, for the purpose of setting aside the will on the ground of fraud. "It is a rule of law, that no one can avoid a bond by averring a delivery thereof upon condition, unless he can show a writing of the condition; for he is charged by a sufficient writing, so he must be discharged by a sufficient writing, or by some other thing of as high authority as the obligation. For the same reason the defendant cannot aver the condition to be different from what is expressed in writing; but any averment consistent with the condition, which shows the condition against law, will be admitted. Therefore where the consideration on which the bond is given is illegal, the defendant may take advantage of it by pleading as simony, usury, compounding of felony, &c., and this notwithstanding there be a different and legal consideration recited in the bond." *Bul. N. P.* 173.

WILLISON v. SMITH.¹ May 10.

Where bail apply to enter an exoneretur on the bail-piece, if fraud is imputed to the bankrupt in obtaining the commission and certificate, and the trading be disputed, the Court will direct an issue to try whether the commission duly issued.

RULE to show cause why an exoneretur should not be entered on the bail-piece, on the ground that the defendant had become a bankrupt, and obtained his certificate pending the suit.

Wallace showed cause on an affidavit imputing fraud to the defendant in obtaining the commission and certificate, and stating that the defendant had his furniture given him by his assignees, to the value of £4000, and his wife's jewels, to the amount of £7000; and also stating the defendant had never traded to England, having only remitted his money in diamonds. He offered to try an issue whether the certificate was fraudulent or not.

Lee, S. G., Baldwin, and Erskine, contra.—The certificate is made conclusive evidence of the trading and bankruptcy, and the Court cannot go into the question now. 5 Geo. 2, c. 30, s. 7, 13. The plaintiff might have op-

¹ S. C. cited *Tidd's Pr.* 211, 8th edit.

posed the certificate, or have petitioned to supersede the *commission. The bail cannot now render, and therefore an *exoneretur* is of [*97] course.

The Court directed an issue, to try "whether the commission duly issued," in which the bail were to be plaintiffs. The issue at first intended was, "bankrupt or not," but a doubt arose whether that would include the question of the petitioning creditor's debt. BULLER, J., said, that on such an issue, on the last circuit, he held the plaintiff to proof of the petitioning creditor's debt; and Lord MANSFIELD seemed to be of the same opinion. No proceedings were to be had in the mean time against the bail, or to fix them.¹

¹ See *Yeo v. Allen*, B. R., H. 23 G. 3, post and the note there.

YOUNG v. JONES. May 11.

A bond given to an incumbent, securing him an annuity of equal value with the profits of the benefice upon his resignation, in order that another person may be presented, who may give a general bond of resignation, so that the patron's son, when of proper age, may be presented, is a bond within 31 Eliz. c. 6, s. 8, and void.

DEBT on bond.—Oyer of condition, which was to pay the plaintiff an annuity of £58 per annum for his life. Plea, That the bond was given in pursuance of a corrupt agreement to resign the living of Bradwell, and therefore simoniacal and void. Replication, traversing the simoniacal contract. At the trial a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

One Stradling having purchased the advowson in fee, and having a son at college intended for orders, proposed to the plaintiff, the incumbent, to resign the benefice on an annuity being secured him of equal value to the clear profits of the benefice, in order that another person might be presented, who should execute a general bond of resignation, so as to make way for the son when in orders, and of age to accept of the benefice. The bond in question was accordingly given by Stradling, the father, the defendant and another person as co-obligors; and the plaintiff resigned the benefice.

Erskine, for the plaintiff.—There are two questions in this case: 1. Whether the transaction be simony within the statute 31 Eliz. c. 6, s. 8? and 2. Whether, if it be within the statute, the bond itself is void?

1. The object of the statute of Eliz. is to put an end to *corrupt [*98] agreements between patrons and clergymen to present improper persons; and therefore it punishes the patron and the clerk. The fifth section covers every transaction that can arise between the patron and the clerk, who are all through the statute considered as *in pari delicto*. The next section (6) is pointed against corrupt agreements between bishops and clerks. By the eighth section, if any incumbent shall corruptly resign the same, &c., for any pension or sum of money, he shall lose double the value of the sum. The meaning of this section is, that if the incumbent corruptly resigns, so as to enable the patron to sell the living, he shall be considered as *particeps criminis*. In order to prove the plaintiff guilty of simony, it must be shown that Stradling has also been guilty of it. Now, suppose that at the time of the purchase of the advowson the living had been vacant, and Stradling had presented the plaintiff on receiving a general bond of resignation from him, in order that he might afterwards present his son, such a bond would have been good, See *vide* *Bishop of London v. Fytche*, 1 East, 426; 1 Br. P. C. 211; 1 Br. C. C. 96, and post; and there would have been no simony on

either side. Suppose again that the father had not been void for the plaintiff, and the plaintiff had said, "Whether you desire the annuity for your son, or give him now a general bond of resignation, it will have been no simony: there would have been no advantage in the choice of the patron or the incumbent. Here the father reserves no benefit, and the contrary, is a law for the annuity of the annuity. By statute does not say generally, "if the incumbent shall resign or be removed, he shall corruptly resign: and this is not a corrupt resignation, as it would have been had it been made for the purpose of a son by procuring the father. There is a corrupt contract in favor of the father. *James v. Lawrence*, 3 L. R. 8 Jac. 1, Cra. Jac. 222. And procuring the son, made the contract with the plaintiff, that the father should resign in his favor, would then have been simony: and so it would have been had procuring the father made the contract in order that he might present a son, and a father may not provide for his son. *James v. Lawrence*, 3 L. R. 8 Jac. 1, Cra. Jac. 222. [499] Suppose the incumbent at the time made in return the duties of his office, may he not resign? and may not the patron give him an annuity sufficient for the same?

The second question is, Whether, supposing the transaction to be simoniacal, the bond is void? Lord Mansfield.—The rule of law, independently of the statute, is, that if the bond is corrupt the plaintiff cannot sue. The case did not press this part of his argument further.

Lawrence, contra.—The law ground being abandoned, it is unnecessary to make any observations upon it. The only question then is, Whether the contract be simoniacal? The position contended for on the other side, that to constitute simony the patron must receive some benefit, is maintained. *King v. Truswell*, B. R. E. 12 Car. 2, 1 Sid. 229. The rule is, that no money shall be given for ecclesiastical benefices, and there is no exception to this rule. The object of the statute of Elizabeth was to prevent benefices from being transferred for pecuniary considerations. Whenever the consideration is pecuniary, the resignation is corrupt. The purchase of a presentation, while the church is vacant, is clearly simoniacal: see *Bartholomew v. Lupton*, 2 Wolfstan, B. R. T. 4 G. 3, 3 Burr. 1164: and this transaction is, in effect, the same thing accomplished by direct.

But it is said that this being a transaction by a father for the benefit of his son is not corrupt. There is no such exception in the statute: and the case in *Croke*, James, cited on the other side, is single in laying down that doctrine. A father is not to provide for his son by illegal means.

The Court having expressed a wish to have the case argued again, it was argued in this term by *Cooper* for the plaintiff, and by *Wilson* for the defendant.

Cooper, for the plaintiff.—Two points may be made for the plaintiff: First, That this is not a bond within the statute 31 Eliz. c. 6; and secondly, that if within the statute, the bond is not made void, but the parties are liable to penalties. [Lord Mansfield said, that it was quite settled that upon any prohibited act the plaintiff could not recover; and Buller, J., added, that there was a case in which Lord Holt expressly mentioned necessary to argue this point. No case has occurred in which it has been determined what is a corrupt resignation *within the statute 31 Eliz. c. 6, s. 8. If the word "corrupt" has any meaning, it follows that there may be resignations which are not corrupt. In section five, making void presentations for money, &c., the word corrupt is not used as in section eight, but the corruption is deduced as an inference, "the person so corruptly taking," &c. The proper test in this case is to see whether there be simony in the patron or person making presentation. If there be not, the

resignation will be good. There is no pretence here for saying that this would be simony in the father. It does not appear that there was any agreement as to the presentation at the time of the purchase of the advowson. In *Barret v. Glubb*, C. B., H. 16 Geo. 3, 2 W. Bl. 1054, simony is defined to be "a corrupt agreement to present." Where is the corrupt agreement here, which makes it simony in the father? and, unless it be simony in him, how can the resignation be corrupt? If this resignation be corrupt, no resignation for reward can be good. Suppose that, the incumbent being unable to do duty, the patron, to provide for the service of the church, gives him an annuity to resign, would that be a corrupt resignation?

Wilson, contra.—In order to render a resignation corrupt, the illegal act must be done by the parson. It is his motive that is to be inquired into. It is true that here there is nothing to show that he was acquainted with the purpose of the patron. He only meant to retain the salary without doing the duty. No infirmity appears, which might be a meritorious cause for the annuity, so as to take the case out of the statute. It is not necessary, in order to bring the parson within the eighth section, that there should be simony in the patron, which is a distinct offence, provided for by another clause of the act. But it is said that this is not simony, because it is a father providing for his son. Though the son was of age long since, he has not yet been presented. [Lord MANSFIELD.—Is there any case where money will not avoid a resignation? If not, will not any benefit operate in the same manner, and might not taking a better living make it bad? The difficulty with me is to draw the line.—We will think of the case.] *Cur. adv. vult.*

Lord MANSFIELD now delivered the judgment of the Court.—As between the plaintiff and defendant, this is a *most unjust case; but we must decide as a question of law; and if the bond is illegal, the plaintiff [*101] cannot recover. The question turns upon the construction of the statute 31 Eliz. c. 6, s. 8. We have had some difference of opinion: I inclined to think that the word corrupt, in the eighth section of the statute, was an emphatic word, and that if the presentation was pure, the resignation was not corrupt; but the rest of the Court are of a different opinion, and think every resignation for money is corrupt. This resignation was certainly for money, and therefore there must be

Judgment for the defendant.¹

¹ See *Fletcher v. Lord Sondes*, Dom. Proc. 1826, 3 Bingh. 502; 1 Bligh, 144, N. T.; and Statutes 7 & 8 G. 4, c. 25; 9 G. 4, c. 94.

HERBERT v. COOK.¹ May 11.

Debt on the judgment of the hundred court of St. Briavell's. Plea, that the cause of action did not arise within the jurisdiction of the inferior court, on demurrer held good.

THIS was an action of debt on a judgment. The declaration was as follows:—"Gloucestershire, to wit. Henry Herbert complains of John Cook being in the custody, &c., of a plea that he render to the said Henry £6 15s. 4d. of, &c., which he owes to and unjustly detains from him, &c. For that whereas the said Henry heretofore, to wit, at the court of the hundred and castle of St. Briavell's, in the county of Gloucester aforesaid, held at the castle of St. Briavell's, in and for the said castle and hundred, and within the jurisdiction of the said court, on Monday, 10th of July, 1780, before W. Court, W. Fryer, and T. Allen, then free suitors there, according to the custom of the said court from time immemorial, used and approved of within

¹ S. C. shortly reported Willes, 37 (n).

the said court, came in his proper person, and then and there in the same court levied his plaint against the said John in a certain plea of trespass on the case, to the damage of the said Henry of 39s. for a cause of action arising and accruing to the said Henry within the jurisdiction of that court; and such proceedings were thereupon had in that court, that afterwards, to wit, at, &c., held, &c., in and for, &c., and within the jurisdiction of the said court, on, &c., before, &c., free suitors, &c., he, the said Henry, by the consideration and [*102] judgment of the said court recovered *against the said John, in the said plea, £3 7s. 8d. for his damages, which he had sustained as well on the occasion of his not performing certain promises and undertakings, then lately made by the said John to the said Henry, within the jurisdiction of the said court, as for his costs and charges by him laid out about his suit in that behalf, whereof the said John was convicted, as by the memorandums and proceedings thereof, now remaining in the said court, more fully appears; which said judgment still remains in the said court there in full force and effect, not annulled, reversed, set aside, paid off, satisfied, or discharged; and the said Henry hath not yet obtained any execution of the said judgment, whereby an action hath accrued to the said Henry to demand and have of and from the said John the said £3 7s. 8d. parcel of the said £6 15s. 4d. above demanded."

There was another count, precisely similar, only calling the inferior court the hundred court of St. Briavell's.

The defendant pleaded, 1. *Nil debet*, on which issue was joined. 2. That the said Henry ought not to have, &c., because he saith that the said judgment and recovery, in the first count of the said declaration mentioned, and the said judgment and recovery, in the said last count of the said declaration mentioned, are one and the same judgment and recovery, and not other or different; and the said John saith, that he cannot deny but that the said judgment and recovery, in the said first count of the said declaration mentioned, was given and had against him the said John; but the said John further saith, that the cause of action of the said Henry (if any) against the said John, for which the said Henry levied his said plaint in the said court of the castle and hundred of St. Briavell's; and whereupon the said proceedings, judgment, and recovery were afterwards had and given, as in the first count of the said declaration mentioned, arose and accrued to the said Henry, at Ross, in the county of Hereford, out of the jurisdiction of the said court of the castle and hundred of St. Briavell's, and did not arise and accrue to the said Henry at the castle of St. Briavell's aforesaid, or elsewhere within the jurisdiction of the said court of the castle and hundred of St. Briavell's. Verification.

To the latter plea the plaintiff demurred generally.

The demurrer was argued in Hilary Term by *Lane* for the defendant, and by *Baldwin* for the plaintiff.

Lane.—The demurrer admits that the cause of action did [*103] arise out of the jurisdiction of the court at St. Briavell's, and the plaintiff has therefore shown himself to be out of the court. This is a jurisdiction exclusive of the king's courts, and is to be construed strictly. The statute of Westminster, 3 ed. 1, prohibits inferior courts from proceeding out of their jurisdiction, and the authorities show, that where an inferior court exceeds its jurisdiction, it is a trespass to act under its judgment. Some of the authorities say that the judgment may be avoided by plea. Br. Ab. Assize, 22, Tresp. 238, *Act. sur le stat.* 49; Year-Book, 10 H. 6, 13, 19 Ed. 4; The case of the Marshalsea, B. R., M. 10 Jac. 1, 10 Rep. 68 b; Randal's case, C. B., T. 30 Car. 2, 2 Mod. 308; *Higginson v. Martin*, C. B., H. 28 & 29 Car. 2, 2 Mod. 195; *Anon.*, C. B., E. 2 W. & M., 2 Vent. 171; *Gold v. Strode*, B. R., T. 2 W. & M., Carth. 148; *Perkin v. Proctor*, C. B., T. 8 Geo. 3, 2 Wils. 382; *Gwinne v. Poole*, B. R., M. 4 W. & M., 2 Lutw. 1568. The

plaintiff might have replied, that the defendant had appeared and admitted the jurisdiction.

Baldwin, contra.—In the declaration below it is stated that the cause of action arose within the jurisdiction, and it was therefore the duty of the defendant, if he objected that the court of St. Briavell's had no jurisdiction, to take advantage of that objection in the suit there. This appears from *Gwinne v. Poole*. So in *Lucking v. Denning*, B. R., T. 1 Anne, 1 Salk. 201, it is laid down, that if a matter arise, *extra jurisdictionem*, and the plaintiff declares of it as *infra jurisdictionem*, the defendant may plead to the jurisdiction of the court, and if that be overruled, may have a prohibition, on the statute of Westminster; but if he waives that, and pleads to the merits, he can never have a prohibition, nor can he take advantage of the want of jurisdiction; for by the averment of the count, and by his own admission, he is estopped to say that it was a matter that arose out of their jurisdiction. Unless the cause of action had been averred to have been within the jurisdiction, the defendant might have brought error. *Quarles v. Searle*, B. R., M. 3 Jac. 1, Cro. Jac. 95.

Lord MANSFIELD.—It seems to me to be a settled point in *Gwinne v. Poole* and *Lucking v. Denning*. The distinction *is this: where the objection is on the face of the declaration, nothing can cure it; but where [*104] it appears regular on the face of the proceedings, it is otherwise.

ASHURST, Justice.—Where the objection arises in point of locality, it is necessary to take advantage of it by plea to the jurisdiction. There must be Judgment for the plaintiff.

A few days afterwards, in the course of the same term, the Court said that they were not satisfied with this judgment, and directed a second argument. The case was therefore again argued in this term by *Baldwin* and *Lane*.

Baldwin, for the plaintiff.—The question is, whether the defendant, in an action upon a judgment obtained in an inferior court, can put in issue a fact upon which he might have taken issue below. If this be permitted, great inconvenience will follow. Supposing that, instead of bringing an action on the judgment, the plaintiff sues out execution, it will be ground for an action of trespass. Litigation and expense would be increased, and the inferior jurisdictions would become useless. The invariable rule is, that these objections shall be taken in the first instance. There are many decisions in the books on the point: the latest is that of *Rowland v. Veale*, B. R., H. 14 Geo. 3, Cowp. 20. It is there laid down by Lord MANSFIELD, in delivering the judgment of the Court, that if the cause of action does not arise within the jurisdiction, the defendant should avail himself of it by plea in the court below. A prohibition lies where the defendant is prevented by artifice from pleading to the jurisdiction, or if his plea be overruled. *Mendike v. Stint*, C. B., M. 29 Car. 2, 2 Mod. 272; 1 Freeman, 294, S. C. If the want of jurisdiction appears on the record it is matter of error, *Quarles v. Searle*, B. R., M. 3 Jac. 1, Cro. Jac. 95; but if the jurisdiction is stated, and the party imparles, or pleads another plea, he cannot afterwards take advantage of this objection. *Lucking v. Denning*, B. R., T. 1 Anne, 1 Salk. 201; *Wagman v. Smith*, B. R., T. 22 Car. 2, 1 Mod. 63. In *Higginson v. Martin*, C. B., H. 28 & 29 Car. 2, 2 Mod. 195; S. C. 1 Freeman, 322, the Court was equally divided. [BULLER, J.—Judgment was in that *case given for the plaintiff by all the Judges. Wyndham gave an opinion differing [*105] from that which he had given two terms before. I state the case from Sir Edward Northey's note.] Lastly, *Gwinne v. Poole* and *Rowland v. Veale* are both in point for the plaintiff.

* There is great contradiction in the reports of this case. In the report in 2 Mod.

Lane, contra.—The Court directed a second argument, on the ground that, though the officer might be excused where the want of jurisdiction does not appear on the face of the proceedings, yet that it is otherwise with regard to the party himself, who must know the want of jurisdiction. The demurrer in this case admits that the cause of action did not arise within the jurisdiction; but it is objected that the defendant ought to have pleaded the want of jurisdiction below, and that he cannot now take advantage of it.

There are three kinds of inferior jurisdictions: 1. Those that are limited as to the subject-matter; 2. Those limited as to persons; 3. Those limited as to place. In the first, if the subject-matter was out of the jurisdiction, all the parties concerned are trespassers; see *Buller's Nisi Prius*, 83. In the second and third, all are trespassers unless the jurisdiction is stated on the face of the proceedings, when the officer is excused, but the party himself is still liable as a trespasser. If he be liable as a trespasser, it is obvious that the defendant is not concluded, by his omission to take issue on the jurisdiction in the court below. There are numerous authorities to show the party a trespasser. *Br. Ab. Action sur le statute*, 49, 35. *Id. Judgment*, 123, 19. The case of the *Marshalsea*, *B. R.*, *M.* 10 Jac. 1, 10 Rep. 68 b., in which it [106] was held that trespass lay against *both the officer and the party—a very hard case. *Weaver v. Clifford*, *B. R.*, *E.* 44 Eliz., 2 Bulstr. 62; *Hodson v. Cook*, *B. R.*, *M.* 35 Car. 2, 1 Vent. 369.

In *Higginson v. Martin*, *C. B.*, *H.* 28 & 29 Car. 2, 2 Mod. 197, *vide ante*, p. 104, it is said by *NORTH, C. J.*, and *WYNDHAM, J.*, on the authority of *Squib's case*, *C. B.*, *E.* 27 Car. 2, 2 Mod. 27; 1 *Freeman*, 193, *S. C.*, that he who sues in an inferior court is bound, at his peril, to take notice of the bounds and limits of that jurisdiction; and if the party, after a verdict below, prays a prohibition, and alleges that the court had no jurisdiction, a prohibition shall be granted; and it is no estoppel that he did not take advantage of it before; see *Blacquiere v. Hawkins*, *ante*, vol. i. p. 378. In *Higginson v. Martin*, as reported in *Buller's Nisi Prius*, p. 83, it is said that the plaintiff below ought to know the extent of the jurisdiction to which he applies for justice, and therefore if, in an action for false imprisonment, he justifies under the process of an inferior court, the plaintiff above might reply, that the cause of action arose out of the jurisdiction of the court; and a rejoinder, praying judgment, if the plaintiff, having, by his pleading in the inferior court, admitted the jurisdiction there, shall now be admitted to deny it here, would not be good.

It is said that the defendant below admitted the jurisdiction by his plea, but that does not appear by the present record. If it was so, the fact ought to have been replied by the plaintiff.

In *Rowland v. Veale* the Court went on a presumption in favor of the jurisdiction; but such a presumption is excluded here, since the plaintiff by his demurrer has admitted the want of jurisdiction. In *Gwione v. Poole*, the plaintiff was an administrator, and peradventure, in the language of *POWELL, B.*, he might not know that the cause of action arose out of the jurisdiction.

Cur. adv. vult.

Lord MANSFIELD now delivered the judgment of the Court.—Upon looking

the Chief Justice and Wyndham are made to say, "the plaintiff may allege the cause of action to arise out of the jurisdiction; and as to his being estopped, by admitting of the jurisdiction below, that cannot be, because an admittance cannot give a court jurisdiction where it had none originally;" while in *Mendyke v. Stint*, 2 Mod. 278, the same Judges say, that "after the defendant has admitted the jurisdiction, by pleading to the action, especially if verdict and judgment pass, the Court will not examine whether the cause of action did arise out of the jurisdiction or not." See further upon this point, 1 *Freeman*, 323 (n), 2d ed.; *R. v. Commissioners of Sewers*, *B. R.*, *M.* 46 Geo. 3, 7 East, 80; *Green v. Rutherford*, 1 Ves. sen. 471.

into the record, there is no question at all. A wide argument has been gone into as to how far an officer may be justified, and how far a party is concluded *from contesting the jurisdiction; but there is no room for that argument. This is an action brought on a judgment of the hundred court of St. Briavell's, in the county of Gloucester, held in and for the said hundred, for a cause of action arising within the jurisdiction; so that the plaintiff takes upon himself to state in his declaration that the cause of action arose within the jurisdiction. If denied, that fact must have been proved. To the action on the judgment, the defendant has pleaded that the cause of action did not arise within the jurisdiction, and to that plea the plaintiff has demurred; therefore the plaintiff has admitted that it was *not* within the jurisdiction. Besides, the judgment is not the judgment of a court of record, and being therefore only evidence, like a foreign judgment, the whole is open.

Judgment for the defendant.¹

¹ Upon this case Sir W. D. Evans, in the notes to his translation of Pothier on Obligations, has made the following observations: "In *Herbert v. Cook* a plea to a declaration in debt on the judgment of an inferior court, not of record, that the cause of action arose without the jurisdiction of the inferior court was, upon demurrer, adjudged to be good. Lord MANSFIELD said, that the argument how far the party was precluded after judgment from alleging that the cause of action arose out of the jurisdiction, was not applicable, for the demurrer admitted the fact; so that it appeared on the record that there was no cause of action within the jurisdiction. But, with deference, I should conceive, that if the defendant was precluded from alleging that the cause of action did not arise with the jurisdiction, his actually making such an allegation could not reasonably be supported, and therefore that the fictitious admission of the truth of a plea, which arises from denying its sufficiency, did not warrant getting rid, by a side wind, of the principal question, whether a new, perfect, and indefeasible cause of action, independent of all question respecting the rectitude of the original judgment, did not arise, by virtue of the judgment itself. In *Galbraith v. Neville*, mentioned in a note to the third edition of Douglas (see ante, vol. i. p. 5 n.), Lord KENYON expressed strong doubts respecting the doctrine advanced in *Walker v. Whitter* (ante, vol. i. p. 1), which was maintained on the other hand by Mr. Justice BULLEB. I conceive that there is no other instance in which it has been judicially decided that the judgment of a court not of record, or of a foreign court, was not conclusive with respect to the point decided, so far as the suit contained proper parties and incidents to have given it a conclusive effect, if that court had been of record; and many cases which have been decided respecting prize causes are directly in support of the opposite proposition." See also *Gahan v. Maingary*, cited Id. vol. ii. p. 307.

*The doctrine of Lord MANSFIELD, that the judgment of an inferior court not of record, and of a foreign court, is not conclusive, has been frequently recognised. See *Sinclair v. Fraser*, ante, vol. i. p. 4, 20 St. Tr. 469, S. C.; *Arnott v. Redfern*, C. B., H. 6 & 7 G. 4, 3 Bingh. 357; *Huxham v. Smith*, 2 Campb. N. P. C. 19; *Barnes v. Winkler*, 2 C. & P. N. P. C. 345. It is very difficult to discover the grounds upon which these cases proceed. While the sentence of a foreign court of admiralty, a sentence of expulsion or deprivation of a member of a college, and a conviction by a justice of the peace, are regarded as conclusive, the judgment of an inferior court of competent jurisdiction may be examined, and all the grounds upon which it has proceeded once more inquired into. It does not appear that this doctrine has an earlier origin than the time of Lord MANSFIELD, and although it has been frequently incidentally recognised, it has never been solemnly adjudged to be law.

The question as to the conclusiveness of a foreign judgment arose, but was not decided, in *Plummer v. Woodburne*, B. R., T. 6 Geo. 4, 4 B. & C. 625, 7 D. & R. 25, S. C.; see also *Briscoe v. Stephens*, C. B., T. 5 Geo. 4, 2 Bingh. 216.

ASTLE v. GRANT. May 11.

(Reported, ante, vol. ii. p. 731, n. 4).

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

IN THE TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.

RANN, Clerk, v. PECKER and Another. June 7.

(Reported, CALDECOTT, 196.)

COCKERELL v. ALLANSON.¹ June 15.

Where, in trespass *quare clausum fregit*, the defendant pleaded a right of way, setting out the breadth of the way, and the plaintiff new assigned, to which the defendant pleaded not guilty; on a verdict for the plaintiff, on the new assignment, with 80s. damages, it was held that he was not entitled to his full costs.

THIS was an action of trespass for breaking and entering the plaintiff's close. The defendant pleaded the general issue, and, in justification, a plea of right of way, in which the width of the way was set out.² The plaintiff new-assigned *extra viam*, and the defendant pleaded not guilty to the new assignment. On that issue there was a verdict for the plaintiff, with thirty [*110] shillings damages. The master *having taxed full costs, notwithstanding the statute 22 and 23 Car. 2, c. 9, *Arden* obtained a rule to show cause why the master should not review his taxation.

Lee, S. G., and *Chambre*, showed cause.—The defendant, by pleading a right of way, has placed a justification on record, and the plaintiff is therefore entitled to his full costs. *Asser v. Finch*, B. R., M. 30 Car. 2, 2 Lev. 284; *Beale v. Moore*, B. R., T. 15 G. 2, 2 Str. 1168. The freehold here might come in question, for though the width of the way is set out, the length is not. By putting this justification on the record, a great additional expense has been imposed on the plaintiff.

¹ S. C. Hullock on Costs, vol. i. p. 77, 2d ed.

² It was a way awarded by certain commissioners, and the plea stated that "they did thereby order, &c., that there should be, at all times thereafter, a road or way for cattle, carts, and carriages, of the breadth of twenty feet, as the same was then staked, ditched, or bounded out," &c. Hullock on Costs, 77.

Arden and Wood, contra.—The question is, whether a man who is guilty of an involuntary trespass in a close, in which he happens to have a right of way, shall be saddled with full costs? He is compelled to plead his right of way, otherwise the plaintiff might give in evidence every cart and carriage which he has driven over the road. The plaintiff cannot therefore complain of the justification, as he might have described the place where the trespass was actually committed; in which case the defendant might safely have pleaded not guilty. The statute was passed to prevent frivolous actions of trespass. Suppose two persons are found trespassing over the plaintiff's close; that one of them has a right of way, and the other not; that the one justifies, to which there is a new assignment, and the other pleads not guilty; and that there is a verdict against both, and a shilling damages; in this case, the party who had a right of way must pay costs, while he who had no right of way will pay none.

In *Asser v. Finch*, the bounds of the way came in question; but here the extent of the way is admitted by the pleadings. The new assignment admits the description as stated in the plea, viz., a way for cattle, carts, &c., of the breadth of twenty feet, as the same was then staked, ditched, or bounded out, lying in the said place, called the Crofts, leading from a central public highway, &c., in the said award before mentioned, into, through, and over the said place in which, &c.

LORD MANSFIELD.—This question arises on the statute for preventing frivolous suits. Whenever there is a new *assignment there is a [*111] new action, and this appears to me to be equivalent to not guilty to the declaration, and nothing else. Does the freehold come at all in question? The defendant has a right of way—the declaration forces him to plead it. He does so with absolute certainty. The plaintiff replies a trespass *extra viam*; he says, I do not mean any trespass in the way; and, in truth, there was no question about it. It is therefore a general action of trespass, and the case in *Levinz* admits that it would be so if the road were agreed.

BULLER, Justice.—I think the case in *Levinz* went on a wrong ground, for it is not sufficient to say that the freehold *might* come in question; the statute requires that it *should* come in question; and then the judge may certify. The plain meaning of the legislature is, that it should come in question. The freehold here could not, or at least did not, come in question.

Rule absolute.¹

¹ In Buller's N. P. 830, there is the following note of this case: "Adjudged, that where the defendant justified for a right of way, and the plaintiff replied *extra viam*, and the defendant pleaded *not guilty*, the plaintiff should have no more costs than damages, unless the Judge certified, for the title does not come necessarily in question. It may, or it may not; and if it does, the Judge ought to certify." "Whence," adds Mr. Baron HULLOCK (on Costs, vol. i. p. 79 (n.)), "it should seem to have been the opinion of Mr. Justice BULLER, that the principle which governed the decision in *Cockerell v. Allanson*, extends to deprive a plaintiff of full costs, without a certificate, in cases where a right of way is generally pleaded, as in 2 Lev. 284, and a replication of *extra viam*, and not guilty thereto." The language of Mr. Justice BULLER, as given in the text, justifies this conjecture; but the opinion expressed by him cannot now be considered as law. The case of *Asser v. Finch* has been, on several occasions, recognised and acted upon. *Martin v. Vallance*, B. R., E. 41 G. 3, 1 East, 350; *Taylor v. Nicholls*, B. R., H. 60 G. 3, 3 B. & A. 443.

Were the question to be argued independently of the latter authorities, it might well be contended that there is no substantial distinction between *Asser v. Finch* and the principal case, and that, according to the opinion of Mr. Justice BULLER, the plaintiff, in both cases, recovering less than 40s. damages, on the new assignment, comes within the statute 22 & 23 Car. 2, c. 9, and is entitled to no more costs than damages. The reason why, in case of a special plea being pleaded, the statute has been held not to apply, is, because it must appear either that the freehold did come in question—in which event a Judge's certificate is unnecessary, since he would be

called upon to certify *what is apparent upon the record—or that it could not, on the pleadings, be brought in question, which is a case to which the statute is not intended to apply. *Martin v. Vallance*, and *Taylor v. Nicholls*, do not appear to come within this reasoning. A right of way was pleaded generally, and not by metes and bounds; and the plaintiff new assigned, to which the defendant pleaded not guilty; and on this issue there was a verdict for the plaintiff for less than 40s. damages. The question to be considered then is, whether, under these pleadings, the freehold could come in question, and whether it will appear on the whole record that it came in question or not? It has been said, that “if the special plea be not traversed, or if traversed and found for the defendant, yet if the plaintiff new assign, and the defendant plead not guilty to the new assignment, and it be found against him, no certificate is necessary; for though the right as claimed by the plea be determined in favor of the defendant, yet the applicability of that right to the trespass complained of is put in issue by the new assignment and plea thereto; and therefore it appears by the whole record, whether the freehold came in question or not.” 1 Saund. 800 (n.), 5th ed. To this it may be replied, that the applicability of the right claimed by the plea to *all the trespasses* complained of, is not put in issue by the new assignment and plea thereto, and that therefore it cannot appear by the whole record whether the freehold came in question or not. For example: The plaintiff declares for breaking and entering his close, called A, the defendant pleads generally a right of way over A, without setting out the metes and bounds: the plaintiff traversed the right of way, and new assigns *extra viam*, to which the defendant pleads not guilty. The plaintiff here says, “You have not the right of way which you claim over A; and if you have, yet you have committed other trespasses in A, which you have not justified.” In new assigning he waives altogether the consideration of the trespasses affected to be justified, and asserts that the matter of the special plea has no application whatever to the trespasses of which he complains in his new assignment. In evidence he proves other trespasses than those covered by the special plea; and the defendant may meet that evidence by showing that the alleged acts of trespass proved under the new assignment were committed on his own soil and freehold. The soil and freehold thus come directly in question, and the jury find that they are the soil and freehold of the plaintiff; but of this no trace is to be found on the record. It neither appears that it *did* come in question, nor that it *did not* come in question. Is it not then a case strictly within the statute, a case in which it is possible for the freehold to come in question, and where it does not appear either upon the record or by the certificate of the Judge that it did, or did not come in question?

This view of the authorities is strengthened by what fell from MANSFIELD, C. J., in *Gregory v. Ormerod*, C. B., T. 51 G. 8, 4 Taunt. 100. “This is totally distinguishable from *Martin v. Vallance*, and it is not wonderful that BULLER, J., should have expressed dissatisfaction at those cases, for it is a *monstrous thing, [*113] that when a plaintiff has been wholly in the wrong for bringing an action for a trespass which is justified by a right of way, or other right, he therefore shall have full costs because he brings another action for another little trifling trespass, which he may happen to be able to prove.”

MEDCALF v. HALL. June 10.

The not presenting a draft upon the same day on which it is received, is not *laches*.
Semble, that *reasonable time* is a question of law.

THIS was an action for goods sold and delivered, tried before Lord MANSFIELD, at Guildhall, on the 29th of May. The defence was, that the defendant had delivered to the plaintiff a draft on Brown, Collinson, and Tritton, which the plaintiff had made his own by negligence. It appeared that the draft was delivered by the defendant to the plaintiff about one o'clock in the afternoon, at London Wall; that the house of Brown, Collinson, and Tritton was in Lombard Street, about half a mile distant from London Wall; that Brown, Collinson, and Tritton were used to pay bills till five o'clock, and that they paid, as usual, till five o'clock on the day on which the plaintiff received the draft; that the plaintiff did not present the draft before five o'clock on that day; and that on the evening of that day Brown, Collinson, and Trit-

ton stopped payment. Lord MANSFIELD, in summing up the evidence to the jury, said, In all mercantile cases there are two objects, convenience and certainty. Under the consideration of convenience, it is to be observed, that it is for the facilitating of trade that paper money is taken. In the taking it, therefore, persons ought not to be laid under too great difficulties, and the making them liable for it from the moment it is received will be to put a clog on the negotiation of it. But every man taking a draft must use due diligence to receive the money; and it is laid down, that if there is time to receive the money, and he neglects to do so, it is at his own peril. On the other hand, to oblige a man to go to the bankers the moment a draft is received would be highly inconvenient. A person may have bills on different bankers, or he may be engaged in other business, and the circumstances of each particular case would require a different rule. There ought, therefore, to be some certain rule to meet all cases of a like kind. Twenty-four hours has been the rule as to bills received in London and the contiguous buildings, and there is good sense in that rule. If such a *rule is once established, it is something certain to go by; and in all the cases where the [*114] parties have been held liable, the twenty-four hours have been exceeded. If the jury thought that a man taking a bill was to run to receive it, they must be aware of the inconvenience of taking drafts. The jury having found a verdict for the defendant, a new trial was moved for by the direction of Lord MANSFIELD; and a rule nisi having been granted,

Wallace and Smith showed cause.—Reasonable time must depend upon circumstances. Thus, if a bill is received in the country, it must be obvious that the time must be enlarged. If a man has drafts payable at different places, he may object to the receipt of any more drafts. It is not necessary to go faster than usual; but in the present case the plaintiff had ample time to present the draft on the day upon which he received it; the distance was only half a mile, and he had four hours. The cases cited at the trial by the Solicitor-General all contained some circumstances of diligence used by the holder, though ineffectually. *Hankey v. Trotman*, B. R., M. 20 G. 2, 1 W. Bl. 1; *Camden v. Cowley*, B. R., E. 3 G. 3, 1 W. Bl. 417; and *Buller's N. P.* 272, were cited.

Lee, S. G., and *Baldwin*, contra.—It is of great consequence that there should be some established rule as to the presentment of these drafts; and leaving the question entirely to the jury, prevents any such rule from being established. At Child's, the practice is to send out all their drafts at nine, because, without an army of messengers, it would be impossible to send out every bill separately. They were astonished to hear that another opinion was entertained at Hoare's. On a question like this, convenience makes the law. Not one case on this subject can be mentioned which does not show that a longer time than this is no *laches*. From Mr. Justice DENNISON's note of *Hankey v. Trotman*, circumstances appear which are not stated in the printed report. The plaintiffs went, at four o'clock, to the banking-house, and got the bill marked, without procuring payment; and the bankers having stopped at six, this was held to be *laches*. In fact, persons receiving drafts hardly ever carry them for payment, but deliver them to their own bankers, and they are consequently not presented till the ensuing day. *As to the [*115] opinion of merchants, it is not to be greatly relied upon; and the practice at Child's house is stronger than any opinion. What is a reasonable time, is a point of law and not of fact, and the Court, not the Jury, are the proper judges of it. *Moore v. Warren*, B. R., H. 7 G. 1, 1 Str. 415; *Turner v. Mead*, B. R., H. 7 G. 1, Id. 416; *Manwaring v. Harrison*, B. R., H. 8 G. 1, 1 Str. 508; and *Fletcher v. Sandys*, B. R., H. 19 G. 2, 2 Str. 1248, were cited.

Lord MANSFIELD.—Nothing is more mischievous than uncertainty in

mercantile law. It would be terrible if every question were to make a cause, and to be decided according to the temper of a jury. If a rule is intended to apply to and govern a number of like cases, that rule is a rule of law. If the rule be that the bill must be presented in a reasonable time, judging from the circumstances of the particular case, then the verdict of the jury is correct; but I doubt extremely whether that rule can be maintained, on account of the great inconvenience which it would occasion in the circulation of paper. Convenience is the basis of mercantile law, and the practice contended for is so inconvenient, that it would put an end to these transactions. Without saying whether or not the rule should be extended so as to give time till the next day, we are of opinion that a case of this consequence ought to be reconsidered.

WILLES, Justice.—I am of the same opinion.

ASHURST, Justice.—Without laying down any general rule, I think the jury have drawn a very narrow line. I agree with Mr. Justice FOSTER in the opinion which he expressed in *Hankey v. Trotman*, that bankers have no right to establish a customary law among themselves at the expense of other men. If the rule upon which the jury have acted were to be established, the inconvenience in the case of bankers would be intolerable. It would be necessary for them to keep 100 servants. There must be a new trial.

BULLER, Justice.—We have now under our consideration a general rule. The case of *Hankey v. Trotman* cannot be supported, for, according to the statement, it was not possible for the party to receive the bill sooner. Reasonable time is a question of law. 2 Inst. 222, Co. Litt. 56 b. The rule [*116] ought not to depend on the number of bills received, and the distance of the various places. There ought to be some general rule, and that rule, I think, should be, that it shall be sufficient to present the bill the next day.

Lord MANSFIELD and Mr. Justice ASHURST concurred with Mr. Justice BULLER as to the propriety of such a rule. Mr. Justice WILLES said, that although he at that time concurred with the rest of the Court, yet, as the consequences of laying down a certain rule were highly important, he should hold himself at liberty to revise his opinion.

Rule absolute.

This cause was accordingly tried in the vacation after Trinity term, when the evidence varied from that given on the first trial. The defendant proved, that in the case of the bankruptcy of Charter and Rivers, Sir Christopher Raymond, who was the holder of a bill on that house, suffered the loss of it by not presenting it the day he received it. It was also proved that the loss of three bills drawn on Fordyce fell on the holders, they not having presented them the day they received them. Some witnesses also were produced to show that the practice was to present bills on the same day. The plaintiff, in reply, showed that it was the practice of several bankers not to send bills to be received until the next day, unless they were received before nine o'clock in the morning. Mr. Hankey, a banker, said, that if he had a draft on Hoare which he had not received before nine, he should not send it till the next day. A clerk of Drummond's proved that they did not receive on the same day the amount of their drafts on the city, unless paid into their shop before nine, nor of the drafts on their neighbors, unless paid in before eleven. The jury retired, and having consulted for three hours, found a verdict for the defendant, delivering their reason in writing, that, according to the usage of the city, there was sufficient time for the plaintiff either to have received it himself or to have sent it to his bankers.

In the ensuing Michaelmas term a rule nisi for a new trial was obtained; but as the same question had arisen in the case of *Appleton v. Sweetapple*, *Vide post*, the Court, upon making the rule for a new trial absolute in the

latter case, enlarged the rule in this. In the course of the same term, *Wallace procured an affidavit from the defendant, by which it appeared that the plaintiff had agreed to abide by the last verdict, and that the draft had accordingly been proved under the commission against Brown and Collinson. The Court thereupon Discharged the rule. [*117]

The KING *v.* The Inhabitants of HENSINGHAM. June 15.

(Reported, CALDECOTT, 206.)

The KING *v.* The Inhabitants of TARRANT LAUNCESTON. June 15.

(Reported, CALDECOTT, 209.)

The KING *v.* The Inhabitants of ST. PETER and ST. PAUL, in BATH. June 15.

(Reported, CALDECOTT, 213.)

The KING *v.* PEDLEY. June 15.

(Reported, CALDECOTT, 218.)

MOSELEY, Bart. *v.* CHADWICK and Another. June 19.

The owner of a market within a town, who receives stallage for the stalls erected therein on his own land, may maintain an action against a person who erects other stalls within the town upon his own land for the sale of articles which pay no toll to the owner of the market.

THE declaration stated that the plaintiff, Sir John Parker Moseley, was possessed of a market holden in the town of Manchester, on Saturday in every week, for the buying and selling of all manner of goods usually bought and sold in markets, and of all liberties, customs, privileges, toll, stallages, packages, and other emoluments belonging thereto; *and thereby might and ought to have had certain due and lawful tolls and profits [*118] of his said market. That the defendants, on Saturday, the 28th of July, 1781, being a market-day, erected and set up divers stalls in a certain part of the town of Manchester out of the public market of the said town, and not within the market of the plaintiff, but near and adjoining thereto, for the purpose of selling divers goods of such nature as are usually sold in markets, and as were sold in the market of the plaintiff; and continued the said stalls from thenceforth hitherto; and caused and permitted to be sold on the said stalls great quantities of such goods as were on the said days sold in the plaintiff's market, for a certain hire and reward paid therefor to the defendants, without the license, and against the will, of the plaintiff, whereby the plaintiff lost many valuable and large tolls and profits which he might and ought to have had.

The second count was the same, only stating the plaintiff to be possessed of the *manor and market of Manchester*, and of a certain *other market, &c.*

The third count stated that the plaintiff was possessed of, &c., and *hath during all that time provided proper and sufficient stalls*, in the said market, for such persons who needed and required the same for the sale of their goods, and also had, and ought to have had, the correction of the said market; and whereas all persons resorting to the said town on Saturdays for the sale of their flesh meat and other goods, and selling the same upon stalls, *ought to sell the same on the stalls of the plaintiff, paying him a reasonable sum for every stall*, the defendants set up stalls, and sold thereon quantities of flesh meat and other goods, &c., as in the first count.

The fourth count was the same in substance, only stating the plaintiff's market to be for the selling of all manner of flesh meat, and that all butchers and other persons resorting, &c., ought, &c.

The fifth count stated the plaintiff to be possessed of the *manor of Manchester*, and of a market to be holden in *certain streets and places* in the said town, appointed and approved of by the plaintiff, for the buying and selling flesh meat; and that the defendants erected, &c., in a part of the town out of the said streets and places so appointed and sold, &c.

[*119] The seventh count charged the defendants with setting up **another market* near and adjoining to, and within a small distance of, the plaintiff's market, viz., within the distance of 300 yards, and selling and permitting to be sold, &c.

The eighth count was the same, only describing the plaintiff's market to be in certain streets and places (as in the fifth count), and stating the market set up by the defendants to be out of the said streets and places, in a part of the town called Pool Fold.

The damage was described in all the counts as in the first. And the defendants pleaded not guilty. The cause was tried before WILLES, J., at Lancaster, when a verdict was found for the plaintiff, with nominal damages, subject to the opinion of the Court, on the minutes taken down by the Associate, which were to be argued as a case, and which were as follows:

"That the plaintiff has a right to hold a market within the town of Manchester. That the market has been extended to various parts of the town, but never to the place called Pool Fold. That the plaintiff has accepted and received stallage and tolls in different parts of the town, but that no such stallage or tolls have been taken in the place called Pool Fold. That the stalls from whence the stallage was collected were erected upon the streets, waste, or soil of the plaintiff. That the prices demanded and taken by the plaintiff are reasonable. That no stallage has ever been paid except to the lords of the manor; but that where stalls have been erected in the fronts of the houses, and contiguous thereto, a compensation has been made to the owners of such houses by the occupiers of such stalls. That nothing has been exposed to sale upon the defendants' new-erected stalls in Pool Fold but flesh meat. That the stalls offered to the butchers by the plaintiff were not sufficiently convenient for the purposes of their trade, and that the market is now more inconvenient than formerly. That the defendants caused to be erected 144 stalls of timber, covered with slate, in Pool Fold, being their own soil and freehold, whereupon, for hire and reward, they permitted to be exposed to sale, and sold, flesh meat, which pays no toll within the town, on the days and times mentioned in the declaration. That the plaintiff's stalls are put up every market day, and taken down in the evening of the same day, except a part called the Old Shambles. That Pool Fold is within the town of Manchester."

[*120] *The case came on to be argued on Friday, the 26th of April, by *Chambre* for the plaintiff, and *Wood* for the defendants.

Chambre, for the plaintiff.—The right of the plaintiff is admitted, and the

only question that remains is, Whether the defendants have done him an injury? It is objected, that erecting these stalls was not setting up a market; that if it was setting up a market it was no injury, because nothing was sold but flesh meat, which paid no toll; and that stallage, which was paid to him, was only for the use of his soil and stalls, and not as owner of the market. It was also objected that the stalls were not sufficiently convenient, which was left to the jury. The answer to the first objection is, that this is not a question concerning the usurpation of a franchise on the crown; though, if it were necessary so to contend, this was, in fact, an erecting of a market; *R. v. Marsden*, M. 6 G. 3, 3 Burr. 1812; 1 W. Bl. 579, S. C.; where it was admitted that the party might have an action. The old remedy in these cases seems to suppose that great part of the injury consisted in erecting the building, for it might be thrown down as a nuisance. Fitzherbert, *Quod permittat prosternere quoddam mercatum*. This is therefore a separate and substantial injury. Tolls are not necessarily incident to a market, and when there are no tolls, unless the erecting of stalls be an injury, no injury could be committed, unless it should be depriving the owner of the market of his court of piepoudre, or appointing the clerk of the market, which are burdens rather than benefits. But erecting stalls is an injury. Prior of Dunstable's case, 11 H. 6, 19, 2 Rol. Ab. 123, C. pl. 1. It is said, that, as flesh meat pays no toll, the selling flesh meat at the defendants' stalls was no injury; but selling goods at the time of the old market being held is itself an injury, and no proof of particular damage is necessary. Fleta, b. 4, c. 28, s. 13, 14, 2 Rol. Ab. 123, G. pl. 2. But supposing that a loss of profit is necessary to sustain this action, there has been an actual loss; for stallage is a profit belonging to a market, and this has been diminished. Though stallage is not necessarily incident to a market, yet it is a profit which may be connected with it. The crown cannot grant a market to be held on another man's ground; and stallage is the perquisite which is enjoyed by the owner of the soil. It may be prescribed *for under the name of toll. 2 Rol. Ab. 123, B. pl. 2, 2 Lutw. 1518. The last objection is, that the [*121] plaintiff has not done what he ought to have done, because his stalls were not sufficiently convenient; but this is no defence. It is the duty of the owner to permit persons to come with their goods to the market, but he is not bound to provide stalls; all that he gives is the use of the soil. If stallage were to be found by the owner of the market, he must lose his market whenever he parted with the soil. The decisions as to stallage were fully considered in the case of the Mayor of Northampton v. Ward, B. R., M. 19 Geo. 2, 7 Str. 1238; 1 Wils. 107, S. C.

Wood, for the defendants, made three points: 1. Whether the defendants have set up any new market; 2. Whether an action can be maintained by the plaintiff for mere loss of stallage when there is no loss of tolls; 3. Whether the plaintiff can maintain this action, not having provided sufficient stalls for the selling of flesh meat. The setting up a market must be the usurping a franchise, not merely erecting a building. The defendants have not usurped any of the privileges incident to a market. They have not erected any court of piepoudre, or provided any weights or scales. *R. v. —*, E. 34 Car. 2, 2 Show. 201; *R. v. Marsden*, M. 6 G. 3, 3 Burr. 1819. [BULLER, J.—In the case in Shower, the action was against the person who bought goods, not against persons who erected stalls.] If no action lies against the person who sells, it would be singular if an action could be maintained against another for furnishing him with the means of conveniently selling. The erection of a building cannot be a ground of action. Some injury must be done. There are no doubt, cases of fraud in which actions may be maintained, as for privately selling; but in those cases there is a

loss of toll to the owner of the market. The writ of *Quod permittat proster-*
nere, &c., supposes every incident to a market. 2. The plaintiff cannot re-
 cover for loss of stallage; stallage must always be taken on the plaintiff's
 soil: but here he claims it as incident to his market, and he sets up no other
 right to it than as incident to his market. [*Chambre*.—The counts as to
 stallage may be laid out of the case. It is not said in any of them that the
 plaintiff was bound to find stalls, but that in fact he did find them. The
 [*122] plaintiff goes only on his right to the market, *and the profits thereof.]
 It is clear, from *Moor*, 474, and the *Mayor of Northampton v. Ward*,
 that stallage is incident to the soil only. Then supposing the plaintiff to
 have been owner of the soil, and not of the market, could he have maintained
 any action against another person for erecting stalls on his own ground? If
 the right is incident to the plaintiff's soil, it is incident to another person's.
 Under this declaration he can only recover damages in character of lord of
 the market, and not of lord of the soil. 3. The plaintiff not having pro-
 vided sufficient stalls cannot maintain this action. The plaintiff does not
 complain of loss of tolls, but of stallage; and this is a sufficient answer to
 the claim. Suppose the case of a ferry: if a good boat is not provided, any
 person may carry passengers in another. Where the consideration for the
 obligation fails, the obligation itself fails too. But it is said that the plain-
 tiff is not obliged to find stalls; it is admitted: but if he neglects to provide
 them, he must not complain that other people have supplied the deficiency.
 No other damage has been laid, or proved. The merely assembling and
 selling in another place, though it may be the subject of an indictment, will
 not support an action without damage shown. [*BULLER, J.*—One of the
 counts states the offence to be erecting stalls and selling too near the plain-
 tiff's market, to the great nuisance of his market. This is the injury, and
 sufficient to support the action. The count is not hurt by the allegation of
 the loss of stallage.]

Chambre, in reply.—The cases relative to usurpations of markets do not
 apply, for it is not necessary here to prove a complete usurpation of the market.
 Nor is the case in 2 Shower any authority. There was no claim in that case
 by the owner of the soil, and no connivance with any other person. It is
 said that the defendants have no court of piepoudre, and no clerk of the
 market; that is the more injurious to the public; and the taking no toll is
 equally prejudicial to the owner of the legal market. The case of the ferry
 arises from necessity; but there is no such necessity here, unless the owner
 of the market shuts it up, and prevents the public from resorting to it. It
 is said that this action rests on the loss of stallage; but it is not so: stallage
 is only one of the injuries; and if it had been the only injury the action
 would have been maintainable.

The case standing over for further argument, it was *argued in
 [*123] Trinity Term (7th June) by *Davenport* for the plaintiff, and *Wilson*
 for the defendants.

Davenport.—The facts found apply to the 1st, 2d, 5th, 7th, and 8th counts.
 It has been argued on the other side, that because the defendants have not
 usurped upon the crown there has been no injury to the individual; but that
 proposition cannot be maintained. When the king grants a market generally,
 the grantee may keep it where he pleases; or if granted to be held in a town,
 he may keep it in any place in that town. *Dixon v. Robinson*, B. R., E. 2
 Jac. 2, 3 Mod. 107. The plaintiff, therefore, might appoint any part of
 Manchester, and he is injured by the erection of the stalls by the defendants
 within the town. The levying of a market by the defendants, so near the
 market of the plaintiff, is in itself an injury. 2 Rol. Ab. 140. It is not
 necessary, to constitute an injury, that the plaintiff should have been deprived

of tolls. Tolls are not necessarily incident to a market, nor can the owner entitle himself to them under the grant of a market. If a market is granted by the crown subsequently to another grant, and to the injury of the former grantee, he would have a remedy; and can it be said that there shall be no remedy against a private person who unlawfully erects such a market?

Wilson, contra.—The question is, Whether the plaintiff has sustained any damage from the act of the defendants; and whether such damage as he has complained of? There are only two modes by which the plaintiff can have sustained an injury—the depriving him of tolls or of stallage. The flesh meat sold paid no tolls, and he cannot therefore lose any tolls, nor has he been deprived of stallage. The grant of a market does not carry stallage with it, for stallage is not necessarily incident to a market, and the plaintiff can therefore only claim stallage as owner of the soil. But he has declared for an injury to his market, of which there was no evidence.

The Court having taken time to consider, on the 19th of June,

Lord MANSFIELD (after stating the pleadings and case) said, The great question is, Whether an action will lie by the owner of a market against another who takes the profit of his own soil by the erection of stalls, without usurping any franchise upon the crown? We are all of opinion that [*124] we are bound by the authorities to say that this is an injury for which an action may be maintained. The authorities are, the Prior of Dunstable's case, Br. Ab. Prescription, 98, 2 Rol. Ab. Market, pl. 1 & 2, Britton, 169, c. 63; *Yard v. Ford*, B. R., M. 22 Car. 2, 2 Saund. 172, 1 Lev. 296, S. C., which latter case is almost in point, and on which we lay great stress. There was no allegation in that case that the defendant took toll, or had a court of piepoudre, or did anything that would be an usurpation of the franchise. Upon these authorities, and upon that of *R. v. Marsden*, we are all of opinion that there must be

Judgment for the plaintiff.

FARRINGTON v. CLERK.¹ June 10.

The defendant received the effects of an intestate under an administration granted to him in Bengal as the attorney of the plaintiff, who was a bond-creditor of the intestate. Administration was afterwards granted in this country, and notice was given by the English administrators to the defendant not to pay over the effects in his hands to the plaintiff. Held, that the defendant could not deny the title of the plaintiff, but that he was bound to pay over to him the effects of the intestate in his hands.

THIS was an action for money had and received, to which the defendant pleaded *non assumpsit*. The cause was tried before Lord MANSFIELD at Guildhall, at the sittings after last Easter Term, when the jury found a verdict for the plaintiff for £254, subject to the opinion of the Court on the following case:

That at the time the defendant received the effects now in his hands, the plaintiff was a bond-creditor of one William Plaw; that the defendant received the effects of the said William Plaw under an administration obtained by him in Bengal as attorney for the plaintiff, and under a power of attorney granted to him for that purpose; that the defendant arrived in England about December, 1781, having the said sum of £254 in his hands, being the amount of the effects he had received, and that he still holds the same; that administration was granted to Plaw's widow by the Prerogative Court of Canterbury in November, 1781; and that afterwards, on the renunciation by the widow, in February, 1782, administration was granted to Hodges and

¹ S. C. 2 Chitty's Rep. 429.

Hill, two of Plaw's bond-creditors, by the Prerogative Court of Canterbury; that the defendant had notice after the commencement of the action, but before the trial, from the said Hodges and Hill, not to pay the said sum of £254 [*125] to the plaintiff, *but to retain it for their use, as the administrators in England of the effects of the said William Plaw. The question for the opinion of the Court was, Whether the plaintiff, by virtue of the administration in Bengal to the defendant, as his attorney; or whether the said Hodges and Hill, by virtue of the administration granted to them here, were entitled to the effects of the deceased William Plaw received by the defendant?

Rous, for the plaintiff.—The question is, Whether the administration granted in Bengal be a mere nullity? If it be merely erroneous, then it is matter of appeal, and cannot be controverted in a collateral proceeding like the present. The granting of administrations is a local jurisdiction. *Hilliard v. Cox*, B. R., E. 12 W. 3, 1 Salk. 37; 1 Ld. Raym. 562, S. C. The statute 13 Geo. 3, empowers the Court at Bengal to exercise all the powers given by the charter, and the charter expressly confers the power of granting administration. The administration being to the defendant, as the attorney of the plaintiff, a bond-creditor, puts the defendant, for the purposes of the administration, in the place of the plaintiff. But supposing this grant of administration to be unlawful, it is only the subject of an appeal to the king in council, and until repealed it is valid. There exists then a lawful administration, unrepealed, to the defendant as attorney for the plaintiff. An administrator may retain for his own debt against a creditor of equal degree, and the defendant may consequently retain, as the attorney for the plaintiff, to whom he is liable for the sum retained.

Law, contra.—The defendant admits the validity of the Bengal administration; and the only question is, Whether an administrator acting under an administration valid in Bengal, is justified in retaining effects, unadministered in his hands, against an administrator having administered in this country. The defendant was not the attorney of any particular creditor, but was entrusted for all; nor was he entitled to retain for any debt but his own. He was an administrator for a limited time, resembling an administrator during minority, or absence, who, acting under a limited authority, can do no act after the determination of that authority. Had he paid over this money to [*126] the plaintiff while he remained administrator, it might have been *valid, but he has done no act whatever amounting to payment. There has not even been a transfer in account, and in order to make an administration of assets there must be an actual application of them. *Tourton v. Flower*, Canc. T. 1735, 3 P. Williams, 369, and *Chapman v. Turner*, 11 Vin. Ab. title, Executor, were cited.

Lord MANSFIELD.—This case is very clear: there is a contest between two bond-creditors for priority, and one of them gets administration by his attorney. The payment to the attorney was payment to the principal, and it does not lie in the mouth of the attorney to say that he has not received the money for the benefit of the party by whom he was employed to receive it.

Judgment for the plaintiff.¹

¹ It is said by ABBOTT, C. J., to be "a settled rule of law, that an agent shall not be allowed to dispute the title of his principal, and, receiving money in that capacity, afterwards say, that he did not do so, and did not receive it for the benefit of his principal, but for that of some other person." *Dixon v. Hamond*, B. R., H. 59 G. 3, 2 B. & A. 318. So where a person claimed goods in the possession of a carrier, and offered to indemnify him, in an action against the carrier, by the party who had delivered the goods to him, GOULD, J., would not permit the defendant to set up a property out of the plaintiff. *Anon.*, cited 3 Esp. 116. See also *Roberts v. Ogilby*, Exch., 2 Geo. 4, 9 Price, 269.

BARZILLAI v. LEWIS.¹ June 17.

A ship warranted Dutch, and sailing under a Dutch name, with a Dutch sea-brief, was captured by the French, and condemned by sentence of the French court of admiralty as English property, and by an English name, the sentence not stating the particular grounds of condemnation. Held, that this sentence was conclusive evidence that the ship was not Dutch. *Semble*, that the parties warranting a ship to be neutral are bound to see that she is documented according to the regulations of the belligerent states.

THIS was an action upon a policy of insurance of a ship warranted neutral, viz. Dutch. The case was tried before Lord MANSFIELD, when, upon the following facts, the plaintiff was nonsuited:

L'Aimable Agathie, a French ship, was captured by an English vessel, taken into Liverpool, and condemned. She was called The Three Graces, and was purchased by a Dutch house, who sent her a Dutch pass, or sea-brief, *according to the treaty of Utrecht, translating the English name [*127] of the vessel into Dutch. She sailed from Liverpool for Amsterdam in June, 1780, with a crew consisting of sixteen persons, viz. four Danes, two Swedes, one Dutch, one Hamburger, one Norwegian, one Portuguese, one Irishman, and five French prisoners, who were going home. The captain was a Dane, having a family at Liverpool. He had been two voyages in the British service, but had no domicile in Liverpool. Others of the crew had been concerned in navigating English vessels. Before she reached Amsterdam she was captured by a French privateer. The admiralty court of St. Maloes released the ship, as being Dutch property, but on appeal to the parliament of Paris she was condemned as the Three Graces, of Liverpool, and English property.

The defendant relied upon the judgment of the French admiralty court at Paris, which did not express the grounds of the sentence, but which, it was said for the plaintiff, was founded on certain ordonnances; by one of which, ships, belonging to enemies and purchased by neutrals, are not considered as domiciliated till they have been in a port of the neutral nation, and by another of which ordonnances two-thirds of the crew are required to be of neutral nations.²

A rule having been obtained to set aside the nonsuit, and to enter a verdict for the plaintiff,

Wallace and Lewis showed cause. The plaintiff, by his warranty, undertook that the ship was neutral, and it was his duty to see that she was properly protected as such. The furnishing her with a Dutch pass could not protect unless she was really a neutral ship, and was a mere fraud. The sentence of the French court is conclusive against the neutrality of the vessel.

Lee, S. G., Davenport, and Baldwin, contra.—The local *regulations of the French government on the subject of prizes make no [*128] part of the law of nations, nor had the plaintiff any notice of those regulations. The vessel was Dutch by the law of nations, and according to the treaties between France and Holland. The law of England, by which the

¹ S. C. Park Ins. 469, 4th ed.; and from BULLER's MSS., 8 T. R. 441.

² In the MSS. of Mr. Justice LAWRENCE it is said that this is the ninth article of an arrêt in 1778. According to Valin (vol. ii. p. 267), the same regulation was made in 1704. "Par l'art. 9, sont déclarés de bonne prise tous vaisseaux étrangers, sur lesquels il y aura une subreccargue, marchand commis, ou officier marinier, d'un pays ennemi de sa majesté, ou dont l'équipage sera composé de matelots ennemis au-delà du tiers, ou qui n'auront pas abord le rôle de l'équipage, arrêté par les officiers publics des lieux neutres, d'où les vaisseaux seront partés."

transfer of the vessel to the Dutch owner was valid, is not to give way to the occasional regulations of the French courts. There is no law of nations declaring that the property in a ship shall not pass until she gets into a port of the country where the purchaser lives. [Lord MANSFIELD.—There is a stipulation between all commercial countries in Europe respecting ships' papers, and what papers shall ascertain property.] The ship had the passport required by the treaty of Utrecht. By the law of nations, whatever papers are sufficient to pass the property, as between the nation from which she goes and the nation to which she goes, are sufficient evidences of property to all the world, and it is not necessary that the vessel should have been in a neutral port. There can be no doubt but that the property passed as between vendor and vendee. [Lord MANSFIELD.—Any passport given to a ship which has not been within the ports of the country of the owner is a fraud.] If the condemnation was grounded, as it appears to have been, on regulations which bind no country but France, the Court will not suffer the sentence to be conclusive evidence, but will allow the question of neutral, or not neutral, to be inquired into. *Bernardi v. Motteux*, B. R., H. 21 Geo. 3, ante, vol. ii. p. 575.

Wallace, in reply.—The pass is not agreeable to the treaty of Utrecht, for it is to be on the oath of the captain, which implies that the ship must be at the time in a Dutch port.

Lord MANSFIELD.—The sentence of the French court, whatever it means, is conclusive. The warranty is, that the ship is Dutch; the meaning is, that she is Dutch, for the purpose of being protected, the warranty being introduced on account of the war. In every war particular regulations are made. The kings of Spain, France, and England have been in the habit of making such regulations; and many in the course of this war have been made by act of parliament. These do not bind other nations, but they are adhered to, and other states must take notice of them for their own safety. The [*129] warranty in this case is, that the *ship is neutral, which means neutral not according to the law of nations, but to the marine regulations of all the powers concerned.¹ The ship was insured by her Dutch name, the underwriters take it for granted that she is so; but when the matter is sifted in the French courts it turns out that she has not the requisites of a Dutch ship, for she never had been in a Dutch port, and the seabrief was not conformable to the treaty of Utrecht. In 1778, express regulations were made in France that no ships shall be considered as changing their property till they have got into port. The ship was condemned by her English name; and I am of opinion that the sentence, whether right or wrong, went on the ground of her being not Dutch, and that it is conclusive.

WILLES, Justice.—I am of the same opinion. The passport is collusive. The only affidavit is by the supposed purchaser; but by the treaty of Utrecht it ought to be on the oath of the captain. The vessel was condemned by the English name. There was no ambiguity in the sentence, and the matter cannot therefore be opened.

ASHURST, Justice.—If the sentence went on a ground collateral to the property, the plaintiff would be permitted to go into evidence. It was so held in the late case of *Mayne v. Walter*, B. R., T. 22 Geo. 3, ante, p. 79. But it appears manifestly that this condemnation was on the ground that the vessel was not completely documented as a Dutch ship. One cannot read it without seeing that it is so.

BULLER, Justice.—The first sentence at St. Maloes seems to have gone on particular grounds, as the muster-roll. On that ground they seem to have

¹ See the observations of LAWRENCE, J., in *Pollard v. Bell*, B. R., H. 40 G. 3, 8 T. R. 442. See also *Price v. Bell*, B. R., T. 41 G. 3, 1 East, 681.

made their decree. But the sentence at Paris is different, and on a libel calling the ship the Three Graces of Liverpool. These words are inserted in the condemnation, and it seems to have been done for the purpose of expressing her not to be neutral. But the other ground is clear and decisive, and I entirely agree with the rest of the Court that under a warranty of neutrality the party warranting must see that the vessel is completely documented, and must comply in every respect with the *marine regulations of the enemies' countries. On both grounds I think the sentence is conclusive. [*130]
Rule discharged.¹

¹ See the cases cited in the note to *Saloucci v. Johnson*, B. R., H. 25 G. 3, post, vol. iv.

MANNING v. NEWHAM.¹ June 19.

Insurance on ship, cargo and freight from Tortola to London. The ship was driven back to Tortola; and being found unfit for the voyage, and it being impossible to repair her, was sold. There were no vessels at Tortola by which the cargo could be forwarded, and it was accordingly sold for nearly the sum insured. The insured having abandoned, Held, that this was a total loss.

THIS was an action on a policy of insurance at and from Tortola to London on the ship *Grace*, a prize-ship, loaded at Surinam, and on the freight and goods.

The ship was valued at	£2,470
The freight	2,250
The cargo	12,400
	<hr/>
	17,120

at twenty-five guineas per cent. premium, free of particular average. At the trial before Lord MANSFIELD, it appeared that the ship sailed on the first of August; but on the second was found unable to keep with the convoy, being leaky; and on the third, making signals of distress, was ordered back by the commodore of the convoy to Tortola. On the sixth of August she arrived at Tortola, and on a survey was found unfit for the voyage, and that it was impossible to repair her in the West Indies; on which the ship was sold for £900, and the cargo for £11,700, there being no ship at Tortola large enough to bring the cargo to Europe. Under these circumstances the owners abandoned to the underwriters, and claimed as for a total loss. A verdict having been found for the plaintiff, the defendant obtained a rule to show cause why there should not be a new trial, on the ground that there was not a total loss either of the ship or of the cargo.

Haworth, Wood, and Murphy, were heard against the rule; and *Lee, S. G., and Wallace*, contra. [Lord MANSFIELD.—I think it fit to fix the facts with precision. There was no ship at Tortola to bring home the whole cargo. There was no precise evidence of damage to the cargo. *Two captains stated that it was not damaged, and there was no evidence specifying a particular damage. I rather inclined, in summing up, to consider it not as a total loss as to the ship and cargo; as to the freight it was admitted to be such. The jury found that the loss was total. It is a question of law, and I think it should be considered by the Court with care.] [*131]
Cur. adv. vult.

¹ S. C. shortly reported *Park Ins.* 221, 6th ed.; *Marsh Ins.* 585; 2 *Camp.* 624 n., from the MSS. of Gibbs.

Lord MANSFIELD now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded.—At the trial I felt a prejudice in favor of considering this as a partial loss. The object of the purchaser at Tortola was to forward the ship and goods to London. The subjects of insurance were three,—the ship, the freight, and the cargo. It was not disputed that the loss of the freight was total, so that the only question was as to the ship and cargo; and we are all come to this conclusion, that the jury have determined that question rightly. The principle is, that if the voyage, in consequence of a peril within the policy, is lost, or is not worth pursuing, that is a total loss. Here the vessel, which was a large Dutch ship with sugars from Tortola to London, was driven back, and became totally unfit for the voyage. That loss could not be immediately supplied. There was no ship sufficiently large to bring the cargo to London.¹ What evidently shows that it could not be forwarded is, that part of the cargo, bought by the owners themselves, has not yet arrived in London. It is admitted that the freight is totally lost, and the same arguments which apply to the cargo apply also to the ship. Under these circumstances we all think that the voyage is lost, and that is the ground of our determination. This is consistent with former cases, and the introduction of nice distinctions would be inconvenient.

Rule discharged.²

¹ If the cargo can be forwarded, it is not a total loss. See *Wilson v. Royal Exchange Ass. Co.*, 2 Camp. N. P. C. 625.

² The doctrine laid down in the above case has been much narrowed by subsequent decisions, if not overruled. See *Parsons v. Scott*, C. B., E. 50 G. 3, 2 Taunt. 363; *Anderson v. Wallis*, B. R., M. 54 G. 3, 2 M. & S. 240; *Hunt v. Royal Exchange Ass. Co.*, B. R., E. 56 G. 3, 5 M. & S. 47. But see *Wilson v. Royal Exchange Ass. Co.*, 2 Camp. N. P. C. 625, where Lord ELLENBOROUGH said he acceded to the principal case.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

IN THE TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.

WILSON and Another, Assignees of FLETCHER, v. CREIGHTON and Another.¹ Nov. 8th.

A, as agent for various persons (but not receiving a *del credere* commission), effected various insurances for his principals with B, an underwriter, upon which insurances various losses and returns of premium were due. B, having become bankrupt, Held, that in an action, by his assignees, against A, for the amount of premiums, the latter could not set off the amount of the losses, or of the returns of premium.

THIS was an action of assumpsit. The declaration contained the common counts, charging the defendants with being indebted to the bankrupt before bankruptcy; and another set of counts, charging them with being indebted to the plaintiffs as assignees. The defendants pleaded the general issue, and gave notice of set-off, "in £3000, upon divers policies of insurance by the bankrupt before he became bankrupt, underwritten, as an assurer to the defendants, upon divers goods, ships, and merchandises, in the respective policies mentioned, which goods, ships, and merchandises, have been totally lost to the defendants; and also in £2000," &c.

The case was tried at Guildhall, before Lord MANSFIELD, after Easter Term last, and a verdict was found for the plaintiffs for £835 2s. 2d., subject to the opinion of the Court on the following case.

"The defendants had large dealings with Fletcher, the bankrupt, in the following manner. As agents or factors to various correspondents, they paid to him, or were debited by him, for premiums upon insurances on behalf of their *correspondents, and had credit for the losses as they happened, [*133] and for the return of premiums. The defendants had no commission [*del credere*, and none of the correspondents for whom they insured, are insolvent. But to all their correspondents, except one, they are in advance, more or less, on account of the policies. Fletcher became a bankrupt on the 23d of November, 1780."

The question for the opinion of the Court was, "Whether the defendants can set off the debit side of the account hereunto annexed against the credit

¹ S. C. cited 1 T. R. 118.

side thereof; which account has been drawn out since the bankruptcy of Fletcher, by the plaintiffs, the assignees, as to the credit side, and by the defendants, as to the debit side thereof. If the Court shall be of the opinion," &c.

[The credit side consisted of various premiums on different vessels, not mentioned on whose account the insurance was made, amounting in all to £947 19s. 8d. The debit side consisted of various losses, and returns of premium, on the same vessels, to the amount of £835 2s. 2d., which the defendants proposed to set off. The balance, being £112 17s. 6d., they had paid into Court; but by a mistake in the account, afterwards discovered, it appeared that they had not covered the whole of the plaintiffs' demand, so that, even if the Court had been of opinion with them, there must have been a verdict for the plaintiffs for £6 odd.]

Law, for the plaintiffs.—The question, whether these are mutual credits, will depend on the statutes of set-off. There must be an exact mutuality. The parties must sue and be sued in the same right. To this purpose the cases are numerous and uniform. The demand is for different premiums, which, according to usage, are not paid at the time, but as between the assurer and assured are considered as paid, and the credit, by usage, is given to the broker only. The test is, mutuality of remedy. Creighton could not bring an action for these losses without averring an interest in the assured. It would otherwise be a wagering policy. The action is for different premiums, and the set-off for different losses. The employment of the same broker makes no privy. If various customers keep money with the same banker, the latter cannot sue for sums due to his various customers. With regard to the premiums, from the time the receipt is written on the policy, [134] they are considered as *paid by the assured, and the credit for them is given by the insurer to the broker. The broker could not have sued for the returns of premium, nor could he have proved the debt under the commission.

Piggot, for the defendants.—There are two cases of the same nature standing for argument—the present, and that of *Wilson v. Watson and Rashleigh*. The only difference is, that, in the latter, the policies were made in the defendants' own names, which is not so in the present case. [Cur. This difference does not appear in the case. We must take it as it stands in the case.] The defendants did not act as brokers; they purchased goods here, insured them, and sent them abroad on account of their correspondents: but they were liable to the sellers here, and, in case of loss, they undoubtedly had a lien on the policies. They transacted their own business without the intervention of a broker. The premiums were not paid at the time, but were carried to account, and settled at Christmas.

The case must be governed by the statutes of set-off. At common law there was no set-off. The statutes with regard to set-off have been liberally construed by the Court of Chancery, and there is no difference between the courts in the construction of the acts. In equity, bonds not due have been allowed to be set off, deducting the discount. *Ex parte Deeze*, Canc. 1744, 1 Atk. 269; *Green v. Farmer*, B. R., E. 8 G. 8, 4 Burr. 2214.

Lord MANSFIELD.—First, with regard to the premium, the credit is given to the broker; and as between the principal and the underwriter it must be regarded as paid. The broker is the debtor for it. The credit could not be to the man who does not appear, and who is not known. Then what would the broker set off? Losses payable to the principal, for which the principal alone can sue. So as to the return of premium; that must be to the principal. I agree that the construction must be the same in this court as in a

court of equity; but it seems to me that these debts cannot be set off against one another, for they are due to different persons.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—I am of the same opinion. In *Green v. Farmer*, the debts were mutual; here they are in different rights, and a court of equity never went so far as to allow a set-off in such a case. [*135]

Postea to the plaintiffs.¹

¹ The cases on this subject are very numerous; see them collected Montagu on Set-off, 22, 2d ed.; Hughes on Insurance.

HENCHMAN v. OFFLEY.¹ Nov. 13.

An insurance was effected on goods on board any ship or ships from B. to L., sailing within certain dates; and another insurance was effected in the same terms, on the same voyage, within certain other dates. The insurer shipped goods on board two vessels; and not having the policies, made a declaration before a magistrate, that he had shipped goods to the amount of £4889, on board vessel A., under the first policy. Both vessels sailed within the time mentioned in the first policy, and A. was lost. Held, that this was a sufficient appropriation of the first policy to the goods on board of A.

THIS was an action on a policy of insurance for £6000 on goods, at and from Bengal to London, on board any ship or ships which should have sailed on or between the 1st of September, 1779, and the 1st of June, 1780. At the trial, before Lord MANSFIELD, it appeared that the plaintiff wrote from India to his correspondent in London to make insurance on goods to be shipped on ship or ships for England to the amount of £6000. He afterwards wrote for a second insurance, in the same manner, for £4000, on goods at and from Bengal to London, on board any ship or ships which should sail between the 1st of February and the 31st of December, 1780. The policies were effected accordingly, and the plaintiff shipped the goods on board two ships, the *General Barker* and the *Ganges*; and at the time of the shipping of the goods on board the *General Barker*, he made a declaration, before Sir Elijah Impey, that he had shipped goods on board that vessel to the amount of £4889, under the first policy. The goods shipped on board the *Ganges* were of the value of £1100. Both the vessels sailed within the time mentioned in the first policy, and arrived in the Channel together, but the *General Barker* was afterwards lost. At the trial the plaintiff contended, that the policy upon which the action was brought related wholly to the goods on board the *General Barker*; and Lord MANSFIELD admitted evidence of the declaration made by the plaintiff before Sir Elijah Impey. For the defendant it was insisted that such evidence was inadmissible, and that the second policy ought to come into contribution. A verdict for £6000 having been found for the plaintiff, *Couper* moved for a new trial. The Court thought the case very clear, but granted a rule to show cause, in order to set right a mistake which the plaintiff had made in computing the loss. [*136]

Lee, Couper, and Piggot, in support of the rule.—The contract between these parties must be construed according to the situation in which things stood at the time when it was entered into, and cannot be affected by anything done afterwards by one party without the participation of the other. At the time of the policies being underwritten, nothing was stated to the underwriters, as to the plaintiff shipping so much, on board the *General Barker*, and so much, on board the *Ganges*; all that the underwriters knew

¹ S. C. 2 H. Bl. 845, n. (a); Marsh. Ins. 178, 2d ed.

was, that the goods were to be shipped on board a ship or ships. If the Ganges had been lost, the underwriters on the first policy might have been called upon to contribute to the loss, for they had no knowledge of the declaration made by the plaintiff at Bengal. The insurance under the first policy attached upon any goods loaded on board any ship or ships sailing on the voyage insured within the period mentioned in the policy. If, then, the underwriters on the first policy would have been bound to contribute in case the Ganges had been lost, they are entitled to the benefit of salvage on all the goods on board both ships.

Wallace, contra.—It is certainly not enough, in order to effect an appropriation of a particular policy, that the insurer should form a resolution in his own mind, which he may disclose or not, as he pleases, after the event; but here he does everything that it was in his power to do. Not having the policies in India, he could not endorse on them the memorandum of appropriation; but he goes before the first magistrate of the place and takes a solemn oath of the apportionment which it was in his discretion to make, without communication with any underwriter. Could the underwriter say, You shall not distribute your property as you please; but I will apply to this policy all the goods you ship, in whatever ship, and to whatever amount?

Lord MANSFIELD.—The only question is, if salvage¹ is to be allowed for [137] £1100, the difference between the sum insured and the value of the goods on board. [*Wallace.*—We add the premium, which make up the £6000.] The plaintiff had no idea of insuring the premium—there must be salvage as to £1100. It is clear from the letters, that that was not intended. It was an after-thought.

BULLER, Justice.—The insurance is on the goods only; the plaintiff has not insured the premium.

Per Cur. The attorneys will settle it without a new trial, and there must be no costs, see *Kewley v. Ryan*, C. B., T. 34 G. 3, 1 H. Bl. 343.

¹Mr. Wilson, in his note of this case, observes, that the word salvage is ill applied, and that the Court only meant that the whole interest in both ships was £6000, of which £1100 was safe.

APPLETON v. SWEETAPPLE.¹ Nov. 13.

Where a bill payable on demand is taken in payment for goods, it is not necessary to present it the same day on which it is received.

Scmble, that reasonable time is a question of law.

THIS was an action against the defendant as drawer of a bill of exchange payable on demand. It was tried before Lord MANSFIELD, at the sittings after last Trinity term, when the following appeared to be the facts of the case. The bill of exchange, which was drawn by the defendant upon Brown and Collinson, was paid to the plaintiff at the Corn-market at Mark Lane, on the sixth of March, about twelve o'clock. The plaintiff kept cash with Dorrien and Co., who were bankers east of the Mansion-house, to whom the bill was sent a little before five o'clock on the same day, and by the bankers it was presented the same day to Brown and Collinson, by whom it was marked,² but not paid, nor was it ever paid by them. The bill would have been paid to a private person, but bankers do not pay to each other after four o'clock. The custom of the Corn-market was proved to be, that after breaking up about one o'clock, the clerks go home, where they are employed

¹8 C. cited Bayley on Bills, 192; 1 Esp. Dig. 69, 4th ed.

²As to the effect of marking a bill or check, see *Robson v. Bennet*, C. B., E. 50 G. 8, 2 Taunt. 888.

half an hour or more in accounting for the bills received that day; and they then send them to the bankers, sometimes before dinner, and sometimes after. The bill in question was carried to Dorrien's after the clerk had dined. For the plaintiff it was proved, by a salesman in Smithfield market, that he sometimes received drafts to the amount of many thousand pounds; and that he could not, if he kept six men for the *purpose, present [*188] them the same day. It appeared that there were four bankers east of the Mansion-house who did not use the clearing-house, and fourteen west of the Mansion-house who never sent their drafts till the next day; see *Rickford v. Ridge*, 2 Campb. 537. Bankers using the clearing-house did not pay after three o'clock as between one another; bankers not using it, not after four o'clock as between one another. Lord MANSFIELD, in summing up to the jury, directed them as follows. "The question is, what time the holder of a draft has to present it to the banker on whom the draft is drawn, without running the hazard of his solvency. The plaintiff says, until the next day; the defendant says, only the time necessary for carrying it. The general question is, what is the time within which it is convenient and reasonable to force the holder to present, or make him liable in case of insolvency. It is a question of law and fact proper for the determination of a jury. In another case, *Medcalf v. Hall*, B. R., T. 22 G. 3, ante, p. 118, a jury have given their opinion, but with too great a latitude; for they say, that, by the usage of the city, the plaintiff might either have sent the draft to his bankers, or have received it himself, before the house of Brown and Collinson stopped payment; but they have not defined the usage. By the general rule, the holder of a bill has until the next day to receive it. A man may do less, but he cannot do more, than the rule allows. No agreement can relax what the law obliges; but, within its limits, men may make regulations for their own convenience. The last jury, being aware of this, established their verdict on the usage: you are therefore to find if there be any such usage; and if there be none, this case is the same as that of a draft on a west-end banker. But whenever there is an usage properly so called, such usage makes the law; and every merchant is supposed to take notice of it, and to refer to it as much as if it were expressed. The usage, as stated, is this—that a draft received in the city east of the Mansion-house, by a person not a banker, on a banker east of the Mansion-house, ought, if there be time, to be carried for payment before five o'clock.¹ The draft in question was received *a little before twelve, and sent by the plaintiff to his banker about half after four. There is no evidence of any [*189] such usage. Mr. Hankey proves, that until he belonged to the clearing-house, he never sent his drafts until the next day, if he received them after eleven o'clock. There is no evidence of any usage as to persons not bankers; and if they have till the next day (though the bankers may, for convenience, agree to settle sooner), the law cannot be narrowed as to them. The practice of the clearing-house is only evidence of a usage confined to certain bankers, and not extended to others. The Bank of England never send until the next day, and there is no difference between the Bank of England and other bankers. Take the usage into your own hands, and see whether you can, on your consciences, say, that there is such an usage within the city of London." The jury having consulted for three hours, brought in a verdict for the defendant, saying, that they found the usage, except

¹ This was stated to be the practice by one of the special jury in *Rickford v. Ridge*, 2 Campb. N. P. C. 537; but in that case Lord ELLENBOROUGH said, "I cannot hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul's, and another for the westward. They may as well fix upon St. Peter's at Rome."

that there was no difference of east and west of the Mansion-house. A rule for a new trial having been obtained,

Wallace showed cause, and contended, that after three verdicts the same way in this case, and in *Medcalf v. Hall*, the Court would not interfere.

Lee and *Wood*, contra.—The usage found by the jury is contrary to all evidence, and to every day's practice; and it has been held, in numerous cases, that a draft may be kept till the next day, *Moore v. Warren*, B. R., H. 7 G. 1, 1 Str. 415; *Turner v. Mead*, B. R., H. 7 G. 1, 1 Str. 416; *Mainwaring v. Harrison*, B. R., H. 8 G. 1, 1 Str. 508; *Fletcher v. Sandys*, B. R., H. 19 G. 2, 2 Str. 1248. It was said by the Court, in *Medcalf v. Hall*, that reasonableness was a question of law; and there are many authorities to the same effect, Co. Litt. 56, b. 2 Inst. 222. So the rules as to reasonable fines on admittances to copyholds, and as to the length of time in cases of notices to quit, have been laid down by the judges. If this be the law, these juries have acted directly contrary to law. But supposing [140] it not to be a question of law but of fact, this jury have found a verdict contrary to evidence. The usage, as now found by the jury, is against the evidence on the trial, for there was no proof of general usage in the city. It was proved that there was no such usage at Smithfield, the Corn-market, or the Bank. The particular agreement of certain bankers as to the clearing-house, which is a private institution, cannot make an usage. [Lord MANSFIELD inquired whether there was any instance of the Court having granted a third or fourth new trial on the same point. *Lee* replied that there was in Chancery.]

Lord MANSFIELD said he was mistaken if the Court had laid it down that notwithstanding any usage, the next day was the time. All that he understood to have been said was, that the next day should be the rule if it stood clear of any usage, but he thought that clear usage might vary the rule. He had doubts about the question; but in this case he thought there ought to be a new trial, since the general usage was not supported by the evidence.

BULLER, Justice.—In a question of law, however unpleasant it may be to us, we must not yield to the decision of a jury. I do not doubt that a special jury in London will, if desired, find a special verdict. The usage is to be considered, but such usage must be reasonable, and it is for the Court to say whether it is good or bad. I think that this verdict is against evidence, as well as against law, and I have not a doubt about granting a new trial. [Lord MANSFIELD.—If a new trial be granted, is evidence of usage to be received? I have no idea that it cannot.] As a general question, I think it ought; but the judge should direct the jury to disregard it if it be unreasonable.

ASHURST, Justice, said, that reasonableness or unreasonableness was a question of law; that he did not think the evidence could be stopped, in time, because it could not be known what usage would be proved; but that the judge should direct the jury what degree of regard they should pay to it, and should direct them not to pay any if he thought it unreasonable. [141] That if he were to try the cause, he should have no difficulty in telling the jury, that he thought the usage bad, both from the shortness of the time and the uncertainty as to different persons.

Rule absolute.

The cause was again tried at the sittings after this term, when the jury again found a verdict for the defendant. A motion was again made for a new trial by *Lee*, in Hilary term, 23 Geo. 3, when the Court refused it, as it appeared that the usage proved at the trial was more general than that in-

¹ A third trial was granted in *Tindal v. Brown*, B. R., E. 26 G. 4, 1 T. R. 171. See also *Goodwin v. Gibbons*, B. R., T. 7 G. 3, 4 Burr. 2108; *Tidd's Fr.* 936, 8th ed.

sisted on at the former trials, not being confined to the part of the city east of the Mansion-house, but general throughout the city. This, BULLER, J., said, varied the case much; and as the Court had pointed out to the plaintiff how he might raise the question on the record—by demurrer to evidence, or bill of exceptions, as should be proper—and as he had not done so, he was not entitled to another new trial.¹

¹ With regard to the period within which bills payable at a certain time after sight must be presented, see *Mulmah v. D'Eguino*, C. B., M. 86 G. 3, 2 H. Bl. 565; *Goupy v. Harden*, C. B., 67 G. 3, 7 Taunt. 159; 2 Marsh. 454; *Holt*, N. P. C. 342, S. C.; *Fry v. Hill*, C. B., 57 G. 3, 7 Taunt. 397; *Shute v. Robins*, coram Lord TEMERDEN, 1828, 1 Moody & Malkin, N. P. C. 133.

As to the time of presenting checks and bankers' notes, see *Robson v. Bennet*, C. B., E. 50 G. 3, 2 Taunt. 388; *Rickford v. Ridge*, coram Lord ELLENBOROUGH, 1810, 2 Campb. 597; *Pocklington v. Silvester*, Sitt. after T. T., 57 G. 3, *Chitty on Bills*, 274, 7th ed.; *Beeching v. —*, coram GIBBS, C. J., *Holt*, 815 (a.); *Williams v. Smith*, B. R., E. 59 G. 3, 2 B. & A. 496; *Camidge v. Allenby*, B. R., H. 7 & 8 G. 4, 6 B. & C. 373; *James v. Holditch*, B. R., E. 7 G. 4, 8 D. & R. 40.

In several of the cases above mentioned, the question, whether reasonable time is a matter of law or of fact, arose. As to this point, see also *Tindal v. Brown*, B. R., E. 26 G. 3, 1 T. R. 168; *Hilton v. Shepherd*, B. R., E. 36 G. 3, 6 East, 14 (a.); *Darbishire v. Parker*, B. R., H. 45 G. 3, 6 East, 3; *Parker v. Gordon*, B. R., E. 46 G. 3, 7 East, 386; *Bateman v. Joseph*, B. R., T. 50 G. 3, 12 East, 434; *Facey v. Hurdom*, B. R., T. 5 G. 4, 3 B. & C. 216, 5 D. & R. 58, S. C.

*The BISHOP of LONDON v. FYTCH.¹ Nov. 15. [*142]

A bond given by a parson to the patron to resign upon request is legal.

THIS was a writ of error from the Common Pleas, in a *quare impedit*, brought by Lewis Disney Fytch against the Bishop of London, for refusing to admit John Eyre, clerk, to the church of Woodham Walter in Essex.

The Bishop pleaded two pleas.² 1. That the said church is a benefice, with the cure of souls; and being vacant, as aforesaid, it was corruptly, simoniacally, and unlawfully, and against the form of the statute, &c., agreed by and between the said Lewis Disney and one John Eyre, that the said Lewis Disney should present the said John Eyre, his clerk, to the said church, so being vacant as aforesaid; and that the said John Eyre should, in consideration thereof, seal, and as his act deliver (a general bond of resignation): that the said Lewis Disney, in pursuance of the said agreement, did corruptly, &c., present the said John Eyre to the said Bishop to be admitted, instituted, and inducted; that the said John Eyre corruptly, &c., executed the bond, which the said Lewis Disney corruptly accepted; by means of which premises, and by force of the statute, the presentation of the said John Eyre, by the said Lewis Disney, became void.

The Bishop pleaded, 2. That he claims nothing but as ordinary; and that the said church being vacant, as aforesaid, it was for the purpose of investing the aforesaid Lewis Disney with an undue influence, power, and control over the said John Eyre as rector of, &c., in case the said John Eyre should, upon such presentation to be made by him the said Lewis Disney, as is herein-after mentioned, be admitted, instituted, and inducted into the same, agreed

¹ S. C. 1 East, 487; and in error, 2 Br. P. C. 211, 2d ed.; *Cunningham's Law of Simony*, 52.

² In support of his defence in this action, the Bishop filed a bill for a discovery, to which the defendant demurred; but the Lord Chancellor overruled the demurrer. See *Bishop of London v. Fytch*, Canc. T. 21 Geo. 3, 1 Br. C. C. 96; *Appendix to Cunningham on Simony*, 184.

by and between, &c., (as in the first plea). And the said Bishop further says, that upon such presentation of the said John Eyre to him the said Bishop, for the purpose aforesaid made, *he the said Bishop, as [148] ordinary of the said church, did then and there duly inquire concerning the fitness of the said John Eyre to be by him admitted, instituted, and inducted into the said rectory and parish church; and that upon such inquiry in that behalf made, he the said Bishop did fully discover and find out that the said John Eyre had sealed, and as his act and deed delivered to the said Lewis Disney such writing obligatory as aforesaid, made in such penal sum and with such condition for making void the same as is hereinbefore mentioned; and that by means thereof the said Lewis Disney would have acquired and had an undue influence, power, and control over the said John Eyre as rector of, &c., if he the said Bishop had upon such presentation admitted, instituted, and inducted the said John Eyre into, &c.; and by reason of the premises, the said John Eyre then and there became and was an unfit person to be by him the said Bishop admitted, &c., into the rectory, &c., upon and by virtue of that presentation.

To the first plea the plaintiff demurred generally; to the second plea he demurred, and assigned for cause that there is no specification of the undue influence, or power, or control mentioned, &c., to which the said Lewis Disney could give any answer, or upon which a proper issue could be joined; and that it is not alleged how and in what manner the said John Eyre was or did become a person unfit to be admitted, &c., so that any issue could be taken upon such allegation of his unfitness.

The Bishop joined in the demurrer, and in Hilary Term, 1782, the Court of Common Pleas gave judgment for the defendant in error upon both pleas.

Adam, for the plaintiff in error.—An objection was taken in the Court of Common Pleas to the second plea, which it will be proper to dispose of in the first instance. It was said that the canon law ought to have been set out in that plea. Now by the statute *Articuli Cleri*, c. 13, and by other statutes, the canon law has been adopted, and is become part of the common law; and it was therefore unnecessary to set it out.

It is not requisite to go through all the cases on resignation-bonds. Those cases arose between the parties to the bonds, which were supported on the principle *Quod fieri non debuit, factum valet*. This question comes on in [144] another shape. The Bishop, who possesses the power of judging, *has deemed the contract improper. The statute of simony, 31 Eliz. c. 6, s. 5, provides, that if any person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, &c., or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person, &c., every such presentation shall be void. This statute provides against the sale of presentations; but should the Court decide against the plaintiff in error, that provision would become nugatory. The parson has only to refuse to resign, when the patron may sue him on his bond, and recover the price of the presentation. That the Bishop has the full discretion over the institution, and has the power of saying who is a proper person to fill the church, appears from *Lynwood*, 107, 281, and from 1 Inst. 96, 344. The policy of the law has always been against these bonds; *Johnes v. Lawrence*, B. R., T. 8 Jac. 1, Cro. Jac. 248; and there are several cases in which their validity has been doubted. *Swayne v. Carter*, Comb. 394; *Grahame v. Grahame*, Canc. 1682, 1 Vern. 131. There is a manuscript note of an opinion of POWELL, J., to the same effect. The ecclesiastical law has established various rules for the behavior of the clergy, and by those rules the parson must take an oath of canonical obedience; but how can he be obedient to the

ordinary when he is bound to resign at the will of the patron? He is also bound to resign purely; and how can he do so under this bond? Independently of simony, this bond is bad by the common law. It was said in the Court of Common Pleas that patronage was merchantable. It is so; but it is merchantable only according to law, and not otherwise. The definition of a benefice is, that it is an ecclesiastical freehold, an office for life. *Le Febure's Traité des Fiefs*; *Father Paul's History of Ecclesiastical Benefices*, 83; *Craig de Feudis*; *Wood's Institutes*, 152. A benefice, being an office for life, is not defeasible by the parson and patron. No resignation is valid till accepted by the proper ordinary. The ordinary is not obliged to accept a resignation; and the law has appointed no known remedy if he will not accept, any more than if he will not ordain. *Gibs.* 822; 3 *Burn.* 321. He who attempts to alter the tenure of his office acts contrary to law, and is an unfit *person to be instituted. An office cannot be granted upon any other tenure than has been usual. Even the king cannot grant offices in any [*145] other manner or form than has been usual. 4 *Inst.* 75, 87, 146; *Com. Dig. Officer* (A. 1). If the stipulation contained in the bond had been inserted in the instrument of presentation to the bishop, can any person say that it would not have been competent to the bishop to refuse such a presentation? Suppose the case of a bishop himself who should give such a bond to any person, can there be any doubt that it would be void? and shall it void in a superior and not in an inferior? Going out of ecclesiastical offices, suppose that the Chancellor took such a bond from a Master in Chancery, or that the Judge of a court of law should give such a bond, would not the act in such cases be illegal?

Lee, contra.—General bonds of resignation are good both at law and in equity, unless an ill use is attempted to be made of them. It is so said by Lord HARDWICKE in *Grey v. Hesketh*, *Canc.* 1755, *Amb.* 268; and in the same case, which was sent out of Chancery into this Court, *B. R.*, *H.* 28 *Geo.* 2, 3 *Burn's Ecc. L.* 354, it was held by this Court that such bonds are valid. The defendant there relied upon the same objection as has been taken on the other side, and pleaded that he offered to resign the living, but that the ordinary refused to accept the resignation. The answer given by the Court was, that the defendant had undertaken for the acceptance of the bishop. There are numerous cases in which it has been held that general bonds of resignation are good. In *Baker v. Watson*, *B. R.*, *H.* 20 & 21 *Car.* 2, 2 *Keb.* 446, the Court said, that it had been above a dozen times adjudged that such a condition is good, and in *Peele v. The Bishop of Carlisle*, *B. R.*, *M.* 6 *Geo.* 1, 1 *Str.* 227, the Court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established even in courts of equity. Injunctions have indeed been obtained against such bonds, but only in cases where an ill use has been made of them, the Court recognising the bonds themselves as good. *Durston v. Sandys*, *Canc. M.* 1686, 1 *Vern.* 411; *Peele v. Capel*, *Canc. M.* 9 *G.* 1, 1 *Str.* 534. What is the "undue influence, *power, and control," mentioned in the plea, [*146] and how can issue be taken on such an allegation? Had the bond [*146] been given or used for any ill use, as if it were given to elude the statute of simony, that might have been alleged in the plea, and if unanswered it would have avoided the instrument. The language of the bishop, in his plea, amounts to this: "I will not admit this man, because he has entered into a bond which is good according to the law of the land."

Lord MANSFIELD.—I have a full note of the argument of this case in the Court of Common Pleas. The general question brought before this Court by the pleadings is the legality of the bond; for the statement of "undue influence" is too vague, and therefore I leave that out of the case. But I

declare my assent to the doctrine of the Court of Common Pleas, that if a corrupt purpose were alleged and not denied, it would avoid the bond at law without an injunction. If the bond were made use of for the purpose of demanding money, or of procuring the giving up of tithes, or for any other bad use, it would be evidence of a simoniacal contract. I also lay out of the case the objection as to the canon law, which indeed is more general than the common law. The only question then is the validity of the bond. The statute of simony passed in the reign of Elizabeth, and in the time of James I. such a bond was held good. In 1698, Bishop Stillingfleet wrote an excellent treatise¹ against these decisions of a court of law; and if the matter were entire, much is said in that discourse that might merit consideration. But it cannot now be argued. We are bound by the decisions, if we thought them ever so wrong. The general question is so well established that I do not think it would be decent to go into it.

WILLES, Justice, of the same opinion.

ASHURST, Justice.—I also am of the same opinion. If the bond be legal, as it is according to the decisions, the different form in which this comes before the Court will not vary the case. The bishop only says, "I will not grant institution, because a legal bond has been given by the clerk."

[*147] *BULLER, Justice.—Nothing but positive authority could induce me to concur in opinion with the rest of the Court. I think there is great weight in the opinion of Mr. Justice POWELL; and if the inconveniences which have followed had been foreseen, I think the Judges would never have determined as they have done. It is difficult to reconcile the decision to the principles of pleading. The bond is to resign on request, which means any request. If the request were unreasonable, how could that be put upon the record? It would be a departure. It is a great stretch to say that though the bond may be bad it must be good. From the record we cannot say what was the motive for giving it. As to the second plea, the undue influence not being assigned, it must be bad. The decisions are uniform, and unless we support them, the rule of *stare decisis* must be blotted out of the books.

Lord MANSFIELD.—I forgot to observe, that there seems to me to be no difference between the present case and a case where the question arises between obligor and obligee.

Judgment affirmed.

Upon this judgment a writ of error was brought in the House of Lords, and several questions were proposed for the opinion of the Judges. After the Judges had delivered their opinions, a debate and division of the House ensued, when there appearing to be, for reversing the judgment nineteen, and against it eighteen, it was ordered and adjudged, that the judgment given in the Court of King's Bench, affirming a judgment given in the Court of Common Pleas, should be reversed.*

¹ A Discourse concerning Bonds of Resignation of Benefices, in Point of Law and Conscience, by the Right Rev. Father in God, Edward Lord Bishop of Worcester; London, 1698. See also A Letter to the Archbishop of Canterbury in Answer to the Bishop of S— about Bonds of Resignation. Stillingfleet's Miscellaneous Discourses, 87; Lond. 1735.

² Brown's P. C. 211, 2d edit., Cunningham's Law of Simony, 52, S. C.

Since the decision of this case, it has been held, that a bond given by an incumbent to reside on the living, or to resign if he do not return to it after a notice, is good. *Bagshaw v. Bossley*, B. R., M. 31 Geo. 3, 4 T. R. 78. In that case Lord KENYON observed, "I avoid saying anything respecting the case of the Bishop of London v. Fytch. When that question comes again before the house of Lords, they will, I have no doubt, review the former decision, if it should become necessary." So a bond of resignation, with condition to reside and to keep the premises on the living in repair, was held legal. *Partridge v. Whiston*, B. R., T. 31 Geo. 3, 4 T. R. 859. It was also for some time considered that the authority of the decision by the Lords did not apply to bonds of resignation in favor of a specified person. See

Newman v. *Newman, B. R., E. 55 Geo. 3, 4 M. & S. 66; Lord Sandes v. Fletcher, B. R., T. 3 Geo. 4, 5 B. & A. 885; Dashwood v. Peyton, Canc., [*148] 1811, 18 Ves. 37; Rowlatt v. Rowlatt, Canc., 1820, 1 Jac. & Walk. 283. But on an appeal to the House of Lords in the case of Lord Sandes v. Fletcher, the judgment of the Court of King's Bench was reversed. 3 Bingh. 501; 1 Bligh. N. S. 144. And it was held that a bond given for resigning a living in favor of one of two brothers of the patron was void. In consequence of this decision two statutes were passed, of which the first, 7 & 8 Geo. 4, c. 25, has a retrospective operation only. By the second of those statutes (the 9 Geo. 4, c. 94), engagements entered into for the resignation of any benefice, to the intent that one, or that one of two persons specially named therein (being the uncle, son, grandson, brother, nephew, or grand nephew of the patron), shall be presented, are rendered valid, subject to certain restrictions and provisions contained in the statute.

The authorities and arguments on the subject of general resignation-bonds are fully collected by Mr. Bythewood in the notes to his *Precedents in Conveyancing*, vol. 3, p. 362, 1st ed.

PAGE, Esq., v. HOWARD. Nov. 15.

(Reported, CALDECOTT, 228.)

GOODRICHT, on the demise of HARE, v. BOARD and JONES.¹ Nov. 19.

Lord Bolingbroke, seised in fee, leased to Stevens for twenty-one years in 1765. In 1770 he granted an annuity to Mrs. Hare, and as a security demised the premises in the possession of Stevens to Mrs. Hare for ninety-nine years, if he should so long live, with a proviso that Mrs. H. should the next day redemise the premises to him for ninety-eight years and eleven months, at and under the said annuity. Mrs. Hare accordingly redemised. In 1778, Lord B. conveyed the premises to Jones in fee, without notice of the annuity. Jones was in the receipt of the rents from 1773, and in 1775 levied a fine, with proclamations, to himself in fee. The annuity became in arrear in 1774. Five years having passed from the time of the levying of the fine, Held, that Mrs. Hare was not barred, as her interest had never been divested.

THIS was an action of ejectment, tried at Kingston, before ASHURST, J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Lord Bolingbroke being seised in fee of the premises in question, by indenture of lease, dated the first of March, 1765, demised the same to W. Stevens for twenty-one years at the yearly rent of £110, which lease, by mesne assignments, *became duly vested in the defendant Board. Lord [*149] Bolingbroke by bond, dated the twenty-fourth of July, 1770, with warrant of attorney to confess judgment, in consideration of £3000, became bound to the lessor of the plaintiff in £6000, conditioned for the payment to her of an annuity of £500 during his (Lord Bolingbroke's) life; and by indenture of the same date, in consideration of the said sum of £3000 as a further security for the annuity, demised the premises in question (among others) to the lessor of the plaintiff for ninety-nine years, if he should so long live, at a pepper-corn rent, with a proviso that the lessor of the plaintiff should on the next day redemise the premises to Lord Bolingbroke for ninety-eight years and eleven months, if he should so long live, at and under the said annuity of £500. The lessor of the plaintiff accordingly next day redemised the premises to Lord Bolingbroke. Before this action the bond, warrant of attorney, and indenture of demise and redemise were duly registered, according to the annuity act. By lease and release, dated the ninth and tenth of

¹ S. C., but without the arguments of counsel. Cruise on Fines, 249, 2d ed.; 5 Dig. 288, 2d edit.

March, 1773, Lord Bolingbroke, for a fair and valuable consideration, conveyed the premises which had been demised to Stevens, together with the subsisting lease of the first of March, 1765, to the defendant Jones, in fee, who in Trinity Term, 1775, duly levied a fine of the premises, with proclamations, to himself, in fee. The lessor of the plaintiff was not party or privy to that fine. Lord Bolingbroke at the time of the execution of the lease of the first of March, 1765, was in the actual possession and receipt of the rents and profits of the estate in question, and under that lease Stevens entered. Lord Bolingbroke was also in the actual possession and receipt of the rents and profits of the premises at the time of the execution of the demise and redemise between him and the lessor of the plaintiff, and so continued until and at the time of the execution of the lease and release of the ninth and tenth of March, 1773. The defendant Jones has, ever since the execution of the indentures of lease and release, been in the actual possession of the rents and profits, and had no notice of the annuity granted to the lessor of the plaintiff till the present action. Five years from the time of levying the said fine, without any claim or entry on the part of the lessor of the plaintiff, expired at Easter, 1780. The present ejectment was brought in Hilary Term, 1782. [*150] The annuity to the lessor of the plaintiff has been in arrear from the twenty-fourth of January, 1774.

The case coming on for argument in Trinity Term, BULLER, J., said, The case is inaccurately stated. It does not appear whether Mrs. Hare gave notice to the tenant in possession at the time of the grant. If she did not, it ought to have been stated. The case must be amended in that point. It must also be stated that Board refused to pay the rent. The five years to bar run from the proclamations; that also is not stated.

On a later day in the same term, *Morgan* informed the Court that the parties had not been able to agree as to the amendments to be made in the case, and also that there was reason to believe that the defendant Jones had notice of the incumbrance, although the plaintiff's attorney had inadvertently admitted that he had not.

The case was argued in this term by *Morgan* for the plaintiff, and by *Rous* for the defendant.

Morgan.—There is no decision expressly in point, though many cases, decided on the effect of fines, will bear by analogy upon this case. At the time of the conveyance to Jones, Lord Bolingbroke had a term, with reversion for years to Mrs. Hare, reversion to himself in fee. On the conveyance to Jones, the latter took only the estate which Lord Bolingbroke had. Could Lord Bolingbroke, had he remained in possession, have avoided his own grant to Mrs. Hare? And can Jones, who claims under him, avoid it? The fine operates upon the lawful estate of the party who levied it, but it does not operate upon the estate of Mrs. Hare, which is not divested or turned to a right.

The situations of Mrs. Hare may be considered in four different views: 1. As lessee; 2. As lessor; 3. As mortgagee; and 4. As grantee of a rent-charge: and in whichever view the case is considered, it will appear that she is not barred. As a lessee, she is protected by the statute 21 H. 8, c. 15, that "farmers shall enjoy their leases against recoveries by feigned titles." This statute was passed with reference to recoveries, but a fine and non-claim have not a greater operation than a recovery. *Hurst v. Bourne*, B. R., H. 1 Anne, Salk. 339. 2. Considering Mrs. Hare as a lessor, on her redemise to Lord Bolingbroke the fine cannot operate. It is clear that *if a lessee [*151] for years levies a fine without first making a feoffment, the fine will be void, for the purpose of making title by way of non-claim, by reason of the imbecility of the tenant's estate. *Carter v. Barnardiston*, Canc. M. 1718,

1 P. Wms. 519; *Fermor's case*, Canc. H. 44 Eliz., 3 Rep. 77 a. 3. As a mortgagee, Mrs. Hare cannot be affected by the fine, for the mortgagor is tenant at will as regards the mortgagee. *Corbet v. Stone*, C. B., H. 1651, T. Raym. 147; *Freeman v. Barnes*, B. R., T. 22 Car. 2, 1 Vent. 82. See Hall dem. *Surtees v. Doe*, B. R., E. 3 G. 4; 5 B. & A. 687; 1 Dowl. & R. 840, S. C.; 5 Cruise Dig. 268, 2d ed. [BULLER, J.—Are not those cases in which the mortgagee had possession of the title-deeds? As that fact is not found, will not Mrs. Hare, if a mortgagee, be a fraudulent mortgagee? The Court of Chancery always postpones the first mortgagee to the second where the title-deeds are not taken possession of.] 4. If Mrs. Hare be the grantee of a rent-charge, that charge being a thing incorporeal and collateral to the land, cannot be divested, and consequently she cannot be barred of it by the fine. *Smith v. Stapleton*, B. R., E. 15 Eliz. Plow. 435, Co. Litt. 838, 2 Bac. Ab. 549. In any of these lights, therefore, Mrs. Hare is entitled to judgment.

The argument for the defendant being postponed, Lord MANSFIELD said, You should think of the following points: 1. Whether the assignees of Lord Bolingbroke can be in a better situation than Lord Bolingbroke himself. 2. Whether Lord Bolingbroke could have barred Mrs. Hare by a fine. 3. What Mrs. Hare is, whether lessee or lessor. She is not a mortgagee or grantee of a rent-charge. She has the estate only as a collateral security, and as long as the annuity is paid she has no notice of the estate being divested.

On the 15th November, *Rous* was heard for the defendant.

There are three principles which govern all the cases respecting the power of fines in operating as a bar: 1. That where the title of the party is consistent with the estate which the fine was meant to protect, it shall not be barred; 2. That adverse interests are protected by claim within the "proper" time; 3. That interests in actual enjoyment are protected without [*152] claim.

Mrs. Hare's lease was to commence in possession upon the failure of payment, which was in January, 1774. Stevens, the tenant, paid the rent to Jones from March, 1773, and the possession of Stevens was his possession. Whether the interest of Mrs. Hare was present or future is immaterial, because she has made no entry, and five years have elapsed; and an actual entry is necessary to avoid a fine. *Berrington v. Parkhurst*, B. R., H. 11 Geo. 2, 2 Str. 1086. The demise in ejectment must be subsequent to the entry, in order to avoid the fine, or it will not support the ejectment, unless the fine be void, which is not the case here. There is no interest to which a fine may not extend. It bars a rent-charge. *Conisbie's case*, cited Carter, 24. It bars the interest of a devisee before entry, *Hulm v. Heylock*, B. R., M. 6 Car. 1, Cro. Car. 200; *Mayor of London v. Alford*, B. R., H. 15 Car. 1, W. Jones, 452, of a tenant by *elegit*,¹ and of a tenant for years. It was at one time contended, that a fine did not bar a lessee for years, and another question was made whether it barred a lessee who was out of possession; but in *Saffyn's case*, C. B., E. 3 Jac. 1, 5 Rep. 123 b, it was resolved, that though the lessee have never entered, yet that as he has an interest accompanied with a present ability to take the profits, such interest may be divested, and put to a right. From that time the doctrine has been uniformly recognised. *Dighton v. Greenvil*, 2 Vent. 321. But where the interest of the party is consistent with that of the person levying the fine, it will not operate as a bar. Thus the interest of a copyholder is not barred by a fine levied by the lord.

¹ Shep. Touch. 22. But the interest of tenants, by statute merchant, statute staple, or *elegit*, cannot be barred by a fine until they have extended the lands, or pursued their rights in some other manner. Essay on Fines, 186.

See *Doe dem. Tarrant v. Hellier*, B. R., E. 29 Geo. 3, 3 T. R. 173. So in general, in the case of trust terms, a fine levied by *cestui que trust* will not bar the trustee; but where the term is not consistent with the estate taken under the fine, the latter will operate *as a bar, as was held in *Freeman v. Barnes*, B. R., T. 22 Car. 2, 1 Sid. 458, on the authority of *Ischam v. Morrice*, C. B., E. 4 Car. 1, Cro. Car. 109. These cases show that if Lord Bolingbroke had levied a fine to confirm Mr. Jones's estate, it would have barred the term vested in Mrs. Hare, although after the default he was tenant at will to her. In the case of the fine levied by one of several joint tenants or copartners, it is a question of fact whether or not the possession is adverse. The question was so left to the jury by DE GREY, C. J., in *Scrutton v. Scrutton*, tried before him in the Essex assizes, and a new trial was moved for in this court and denied. Lord HARDWICK also held the same in *Story v. Lady Windsor*, Canc. 2 Atk. 630. Whether the interest supposed to be affected by the fine is consistent with the title of him who levies it, is matter of evidence. All claims under the *conusor* must be consistent with the title, and protected by the fine. Upon this principle a mortgagee is not barred by the fine of the mortgagor. [Lord MANSFIELD.—Suppose the mortgagor conveys, and the purchaser levies the fine without notice?] That case would depend upon the question, whether the mortgagee had the freehold or not.

Applying these principles to the present case, it appears that Mrs. Hare had such an interest as was capable of being barred by a fine and non-claim, for she had a right to enter upon the land before the levying of the fine; and it also appears that her interest was not consistent with that of Mr. Jones, so as to avoid the effect of the fine. Nor was there any trust between her and Mr. Jones which might prevent the fine from operating. Jones stands in the place of Lord Bolingbroke only as the owner of the inheritance, and not as to any personal notices or trusts which bound Lord Bolingbroke. Both Jones and Mrs. Hare are *bonâ fide* purchasers, and to decide against Jones would be to decide that fines shall bar only in cases of wrongful seisin and possessions, where least of all they ought to bind. It is said that Lord Bolingbroke could convey no more than he had, and that the fine protects only the estate conveyed. This confounds the distinction between non-enlargement of estate and the bar created by the statute to dormant claims. If there has been any breach of trust between Lord Bolingbroke and Mrs. Hare, the remedy is a personal one against *Lord Bolingbroke, as [*154] where a trustee sells to a *bonâ fide* purchaser without notice; but the present is a dry question of law. [Lord MANSFIELD.—Suppose both parties innocent, for if there is any fraud it changes the question totally: if there is not, is Mrs. Hare's estate divested? For if Lord Bolingbroke had levied the fine to his own use there would have been no question.]

Morgan having desired time to reply, the case stood over; and now, in replying, he was stopped by the Court.

Lord MANSFIELD.—We have looked into all the cases, and no doubt remains with any of us. [His Lordship then stated the case.] On this case it appears that Jones and Mrs. Hare are both innocent. Jones is a *bonâ fide* purchaser for a valuable consideration, and Mrs. Hare is not alleged to have had any notice of the conveyance to Jones. There was no notoriety in that conveyance to apprise her of the fact; the lease to Stevens was still subsisting, and the payment of the rent by Stevens to Jones, instead of to Lord Bolingbroke, was not notorious in the country. At the time of the conveyance to Jones, in 1773, there were no arrears of the annuity due to Mrs. Hare, and she had at that time no right to come upon the land. Any laches on her part afterwards could not be *malâ fide* to Jones; so that it is a ques-

tion of mere law between the parties whether Mrs. Hare is bound by the fine and non-claim. This question depends upon a rule of law founded in good sense, and to which I know of no exception, viz., that no fine shall bar an estate either in possession, reversion, or remainder, which is not divided and put to a right. This is the first resolution in *Margaret Podger's case*, B. R., E. 10 Jac. 1, 9 Rep. 106 a. This general rule is illustrated, explained, and applied in the books to a variety of cases. Thus a collateral interest, as a rent-charge, or right of common, cannot be barred by a fine. The authority in *Carter* is mistaken. The owner of a rent-charge levied a fine of the land, and it was held that the rent-charge was gone by the fine; but a rent-charge in a third person will not be barred by a fine and non-claim. The parties to a fine, or one of them, must be seised and possessed, adversely to the interest to be barred; if that interest be consistent with the seisin and possession, it is not barred. Now at the time of the conveyance to Jones there was no adverse *possession by Lord Bolingbroke; there were no arrears of [*155] the annuity, and Mrs. Hare had no right of entry. At the time of the fine being levied, a year and a half's arrears of the annuity were due; but Mrs. Hare was not bound to resort to her remedy from the land; she had other security. Nor could she have entered into the possession of the land; she could only, under the statute 4 & 5 Anne, c. 16, have given notice to Stevens, the tenant, and have brought an action for the rent. In every shape it is most clear that her interest was not divested, or turned to a right, and remained after the fine just as it was before. The consequence is, that there must be,

Judgment for the plaintiff.

Lord MANSFIELD informed Mr. Rous, for the satisfaction of his client, that the case had been much considered, and that the Judges had talked it over with many others.

PINLEY, Gent., one, &c. v. BAGNALL. Nov. 21.

A., an attorney, was employed by B., another attorney, as his clerk, and it was agreed between them that A. should have the benefit of the common law business. C. applied at the office of B., and common law and other business was done for him there. In an action brought by A. against C. for the common law business, Held, that there was evidence to go to the jury of a retainer of A. by C. *Semble*, that money paid cannot be given in evidence under a count, on an account stated.

THIS was an action brought by the plaintiff, an attorney, for his fees. The declaration also contained a count on an account stated, and the defendant pleaded the general issue. At the trial, at Warwick, before GOULD, J., it appeared that the plaintiff had acted as clerk to Mr. Mainwaring, an attorney who had become a bankrupt. The defendant had employed Mainwaring as his attorney, and had never applied personally to the plaintiff, otherwise than at Mainwaring's office, and in his absence. It appeared that, by agreement between Mainwaring and the plaintiff, the latter had all the benefit of the common law business; but of this agreement the defendant had no notice. The assignees of Mainwaring delivered a bill for the conveyancing and other business done by the defendant, and the plaintiff delivered a bill for the common law business. The plaintiff gave evidence of money paid by him to the use of the defendant, which, he insisted, might be given in evidence under the count on an account stated. The learned Judge before whom the cause was tried being of opinion that there was no evidence of a retainer of the plaintiff by the defendant, and that the money paid could not be given in evidence under the count on an account stated,

[*156] nonsuited the plaintiff. A *rule to show cause why the nonsuit should not be set aside and a new trial had, having been granted,

Balguy was heard in support of the rule.—There was, at all events, evidence of a retainer sufficient to go to the jury. The defendant applied to an office where the practice was for the plaintiff to have the benefit of the common law business. It was for the jury to say, whether that did not constitute a retainer. Under an *insimul computassent*, money paid, laid out, and expended, may be given in evidence. Originally, the practice at Nisi Prius was more strict, but in modern times it has been much relaxed. In the case of *Keymis v. Rees*, at the Monmouth Lent Assizes, 1779, before BULLER, J., the declaration contained counts for goods sold and delivered, and on an account stated. It appeared that a bull was sold for a certain sum, with an agreement to return six guineas of the price, if the animal was returned before a certain day. The bull was returned before the day, and an action brought for the six guineas, which BULLER, J., permitted to be given in evidence under the *insimul computassent*. So in *Thompson v. Rickards*, at the Warwick Summer Assizes, 1781, before GOULD, J., money had and received was given in evidence under the *insimul computassent*, on the ground, that any money for which the defendant was liable might be given in evidence under that count.

Dayrel, contra.

Lord MANSFIELD.—The defendant applying at the office must be supposed to employ the persons at that office, upon the terms on which business is there done. This was proper for the consideration of the jury, and the nonsuit was wrong. As to the second point, I am of opinion that money laid out could not be given in evidence under an *insimul computassent*.

BULLER, Justice.—Whenever there is a liquidated debt, it may be given in evidence under an account stated. That was the ground of my decision at Monmouth, which perhaps was a strong one; but I think the Court should go even on slight evidence to prevent a nonsuit on so formal an objection. There was evidence of an agreement to take the specific sum of six guineas if the bull should be returned, and that, therefore, might be considered as a sum admitted to be due. Here, too, there is a precise sum; but the doubt [*157] *is whether there was any assent.¹ Upon the first point, I think there is evidence to go to a jury. The action is on an attorney's bill which was delivered, and no objection made to it; at least none appears, and I should think that alone sufficient.

Rule absolute.

¹ An acknowledgment or assent on the part of the defendant seems to be absolutely essential. See *Tucker v. Barrow*, B. R., H. 8 & 9 G. 4, 7 B. & C. 624; 1 Man. & R. 518, S. C. See also *Knowles v. Michel*, B. R., H. 61 G. 3, 18 East, 250; *Highmore v. Primrose*, B. R., E. 56 G. 3, 5 M. & S. 68.

FOLKES, Bart., v. CHADD and Others.¹ Nov. 21.

In an action of trespass for cutting a bank, where the question is, whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbor, the opinions of scientific men, as to the effect of such an embankment upon the harbor, are admissible evidence; and evidence may also be given, that other harbors, similarly situated, where there are no embankments, have begun to be choked and filled up.

THE trustees for the preservation of Wells harbor being of opinion, that a bank which had been erected above twenty years, for the purpose of pre-

¹ S. C. cited 4 T. R. 498; 1 Phill. Ev. 276, 6th ed.

venting the sea overflowing some meadows which had descended to the plaintiff, contributed to the choking and filling up of that harbor, by stopping the back-water, threatened to cut it down, on which the plaintiff applied to the Court of Chancery for an injunction. The Court thereupon directed an action of trespass to be brought against the defendants for cutting the bank, directing the trespass to be admitted at the trial; and that the only point in dispute should be, whether the mischief which the bank did to the harbor was a justification for the cutting, that thus the merits of the question might be decided by a jury. The action was first tried at the last Lent Assizes for the county of Norfolk, when the evidence of a Mr. Milne, an engineer, was received, as to what, in his opinion, was the cause of the decay of the harbor, and to show that, in his judgment, the bank was not the occasion of it. The plaintiff, on that trial, obtained a verdict, and in Easter Term last a new trial was granted, on the ground that the defendants were surprised by the doctrine and reasoning of Mr. Milne, and the parties were directed to print and deliver over to the opposite side the opinions and reasonings of the engineers whom they meant to produce on the next trial, so that both sides might be prepared to answer them. Accordingly they went to trial at the last *Summer Assizes, when the defendants offered evidence to show, that [*158] other harbors on the same coast, similarly situated, where there were no embankments, had begun to fill up and to be choked about the same time as Wells harbor. They also called Mr. Smeaton, an eminent engineer, to show that, in his opinion, the bank was not the cause of the mischief, and that the cutting the bank would not remove it. The receiving this evidence was objected to, as the inquiring into the site of other harbors was introducing a multiplicity of facts which the parties were not prepared to meet. It was also objected that the evidence of Mr. Smeaton was a matter of opinion, which could be no foundation for the verdict of the jury, which was to be built entirely on facts, and not on opinions. GOULD, J., who tried the cause, rejected the evidence. *Partridge* having obtained a rule for a new trial, on the ground that the Judge had improperly rejected the evidence,

Harding, Cole, Graham, and Le Blanc showed cause, and urged the arguments made use of at the trial in support of the objection. They insisted also, that if the bank originally caused the mischief, the defendants might cut it down, though it would not restore the harbor.

Wallace, Partridge, Joddrell, and Sayer having been heard in support of the rule,

Lord MANSFIELD delivered the opinion of the Court.—This case comes before the Court under the same circumstances as if it were an indictment for the continuance of a nuisance, and it is a question, therefore, whether the demolition of the bank would contribute to restore the harbor. The Court will not compel the removal of a nuisance where it does not appear to be a prejudice, but will set a small fine. Nor would the Court of Chancery, in this case, compel the pulling down of a bank for a damage which might be compensated by a shilling.

The facts in this case are not disputed. In 1758 the bank was erected, and soon after the harbor went into decay. The question is, to what has this decay been owing? The defendant says, to this bank. Why? Because it prevents the back-water. That is a matter of opinion:—the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause; nobody thought that it would produce this mischief when the bank was erected. The commissioners themselves look on for above twenty *years, until a property has been acquired which would be good by the [*159] statute of limitations. It is a matter of judgment, what has hurt the harbor. The plaintiff says that the bank was not the occasion of it. On

the first trial, the evidence of Mr. Milne, who has constructed harbors, and observed the effect of different causes operating upon them, was received; and it never entered into the head of any man at the bar that it was improper; nor did the Chief Baron, who tried the cause, think so. On the motion for the new trial, the receiving Mr. Milne's evidence was not objected to as improper; but it was moved for on the ground of that evidence being a surprise; and the ground was material, for, in matters of science, the reasonings of men of science can only be answered by men of science. The Court considering the evidence as proper, directed the opinions to be printed, and to be exchanged. Under the persuasion of this being right, the parties go down to trial again, and Mr. Smeaton is called. A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbors, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskilfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. Handwriting is proved every day by opinion; and for false evidence on such questions a man may be indicted for perjury. Many nice questions may arise as to forgery, and as to the impressions of seals; whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken. I have myself received the opinion of Mr. Smeaton respecting [*160] mills, as a matter of science. The cause *of the decay of the harbor is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence. As to the evidence respecting the situation of other harbors on the same coast, we think that if there were no embankments it was admissible in illustration of Mr. Smeaton's opinion; but as to harbors in which there were embankments, we think it was improper, since *litem lite resolvit*.
Rule absolute.¹

¹ This may be regarded as the principal case on the admissibility of matter of opinion. It has been followed and confirmed by a variety of similar decisions. In *Thornton v. Royal Exchange Assurance Company*, Peake, N. P. C. 25, Lord Kenyon admitted the evidence of a ship-builder on a question of seaworthiness, though he had not been present at the survey. And, in a subsequent case, his lordship received the evidence of the underwriters in explanation of the terms of a policy. *Chaurand v. Angerstein*, Id. p. 48. See also *Berthon v. Loughman*, 2 Stark. N. P. C. 258; but see *Durrell v. Bederley*, Holt, N. P. C. 286. So, a person versed in the laws of a foreign country may give evidence as to what in his opinion would, according to the law of that country, be the effect of certain facts. *R. v. Wakefield*, Cor. Hullock, B. Murray's ed. 238; *Chaurand v. Angerstein*, Peake, N. P. C. 44. So, in prosecutions for murder, medical men are allowed to state their opinions, whether the wounds described by the witnesses were likely to have occasioned death. In the case of *R. v. Wright*, who was tried for murder, the defence being insanity, the twelve judges were unanimous in opinion, that a witness of medical skill might be asked, whether, in his judgment, such and such appearances were symptoms of insanity; and whether a long fast followed by a draught of strong liquor was likely to produce a paroxysm of that disorder in a person subject to it. But several of the

judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz.: whether, from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. *R. v. Wright, Russ. & Ry. Cr. Ca. R. 456; 2 Russell on Crimes, 623, 2d edit.* The Scotch law is the same as our own on this subject. "Professional men, when examined on the subject of their art or science, are of necessity allowed to state their opinions, and to speak to the best of their skill and judgment. In homicide cases the *corpus delicti* is, in many cases, established by no other evidence." Burnet on the Criminal law of Scotland, p. 458.

In the principal case, Lord MANSFIELD says, "Handwriting is proved every day by opinion." In *Revett v. Braham*, *B. R., H. 32 G. 8, 4 T. R. 497, two [*161] clerks from the post-office, accustomed to inspect franks, and to detect forgeries, were allowed to give evidence of their opinion as to the genuineness of the handwriting to a will; and similar evidence was admitted in *R. v. Cator*, by HORNAM, B., 4 Esp. N. P. C. 145; and in *Birch v. Crewe*, by ABBOTT, J., cited 5 B. & A. 382. The authority of these decisions, however, has been much shaken by the case of *Cary v. Pitt*, Peake Ev. Appendix, 84, 4th ed., in which Lord KENYON rejected such evidence; and by the case of *Gurney v. Langlands*, B. R., H. 2 G. 4, 5 B. & A. 380, in which the judges expressed great doubts as to the admissibility of such evidence, and observed that, at all events, it was entitled to no weight, and was much too loose to be the foundation of a judicial decision either by judges or juries.

COURT v. MARTINEAU. Nov. 21.

Two prizes being carried into Liverpool, the captor gave orders to effect an insurance on them in London. One of the prizes arriving on Sunday, the owner sent a despatch to his agent in London, stating that fact, and expressing fears as to the other ship. The express reached the broker on Tuesday, and on that day an entry was made at Lloyd's of the arrival of the vessel at Liverpool. On Wednesday the captor's agent effected an insurance on the other vessel at a premium of fifty guineas per cent., without communicating to the underwriters the fact of the express. Held, that this was not a concealment which vitiated the policy.

THIS was an action by an underwriter to recover back the amount of a loss paid by him on a policy of insurance, which, as it was contended, was avoided by concealment. The cause was tried at Guildhall, before BULLER, J., who, thinking the concealment material, directed the jury to find a verdict for the plaintiff. A new trial was afterwards granted; and Lord MANSFIELD thinking the transaction fair, and the concealment not material, a verdict was found for the defendant. The following appeared to be the circumstances of the case.

The Essex, of Liverpool, took, off the coast of Ireland, a ship and brig from St. Eustatius to Amsterdam. The owners of the Essex, at Liverpool, ordered insurance on the prizes to be made in London. On Sunday night, the defendant, who was a part owner, sent an express to his broker with an account of the arrival of the brig, but expressing great fears about the ship, and ordering further insurance on her. He added, that if she arrived by Monday morning he would send another express; and he enclosed a letter to be shown to the underwriters, which he dated on the Saturday. The express reached the broker on Tuesday, and on Wednesday, not having received the second express, he got the policy underwritten by several persons, and amongst the rest by the plaintiff, at a premium of fifty guineas per cent. *The non-arrival on Sunday night could not be known in London by [*162] the post till Wednesday noon, after the plaintiff had underwritten. On the Tuesday an entry was made in Lloyd's books, by the direction of the broker, that the brig had arrived, but that the ship had not. The broker did not communicate the fact of the express.

A rule for a new trial having been granted,

Lee showed cause.

Wallace, Wilson, and Law, contra.—The underwriter supposed that the ship was not arrived on Saturday, or on Sunday at the latest, and that there was no later intelligence. The broker knew that she was not arrived on Monday. This varied the risk materially; as, in these cases, a day, or even an hour, may make a great difference. The underwriter calculated on the probability that the ship might have arrived between the Saturday or Sunday and the time of underwriting; but that calculation ought to have been formed upon different facts, and those facts were in the knowledge of the broker. If the concealment is at all material, so as to vary the risk or advantage in any degree, it is sufficient to avoid the policy; for, as to all material circumstances, the knowledge must be exactly equal on both sides. [The policy being "from sea to Liverpool," Lord MANSFIELD asked, whether on such a policy, if the loss happened before the time of underwriting, though not known, there would be a recovery? He was answered, that there would; and that in most cases of policies on ships abroad, the event is over before the insurance is made.]

The Court having taken time to consider,

Lord MANSFIELD delivered the judgment of the Court.—On the Wednesday, before the post came in, the plaintiff underwrote this policy at fifty guineas per cent. This was emphatically informing the plaintiff that the ship had not arrived, and that the defendant did not believe she had arrived at that moment. Under any other circumstances such a premium could not have been given. The plaintiff alleges that he has since discovered that the broker received a letter by express from Liverpool despatched on the Sunday, with information that the ship had not arrived, and that the defendant feared she might be retaken. The letter also stated, that if she arrived on the Monday, the defendant would send another express. We lay out of our consideration the ostensible letter intended to be exhibited to the underwriters, for *in fact it was never shown to them. The sole objection therefore is, that the broker did not communicate the fact of the express. Now it must have been known, that a merchant at Liverpool so circumstanced would send an express upon the ship's arrival, since the whole of the premium paid after that event would be thrown away. If the underwriter had wished to know by what means the broker acquired his information that the ship had not arrived, he should have made inquiry; but he waived the inquiry by putting no questions to him, though they naturally arose from the subject. By the course of the post from Liverpool, the underwriter must have known that the entry of Tuesday at Lloyd's did not arrive by post. The broker said nothing to mislead. We are all of opinion that there was no concealment, and that it was owing to himself that the underwriter did not receive the information which he now complains was withheld from him.

Judgment for the defendant.¹

¹ There appear to be only two circumstances in this case the concealment of which could be material, viz. the non-arrival of the vessel insured, and the arrival of the brig captured at the same time. The first objection was answered by the observation of Lord MANSFIELD, that there was, in fact, the strongest assertion of the non-arrival, by the payment of fifty guineas per cent.; and that if the underwriter was desirous of ascertaining the broker's means of knowledge, it was his duty to make inquiries. So it has been held, that the mere concealment of the fact of a ship having sailed is not material; and that if the underwriter wanted to know whether she had sailed, he ought to have inquired. *Fort v. Lee*, C. B., H. 51 Geo. 3, 3 Taunt. 381; and see *Forley v. Moline*, C. B., E. 64 G. 3, 5 Taunt. 480; 1 Marsh. 117, S. C.; and *vide ante*, p. 41 (n). With regard to the second question, the concealment would seem to be material. *Kirby v. Smith*, B. R., T. 58 G. 3, 1 B. & A. 672; but the underwriter had the means of knowledge in his own power, in consequence of the entry at Lloyd's. *Frere v. Woodhouse*, Holt's N. P. C. 672; and see *Littledale v. Dixon*, C. B., H. 45 G. 3, 1 Bos. & Pul. N. R. 151.

*JOYCE v. WILLIAMSON.¹ Nov. 21.

[*164]

Action on a bottomry bond containing a clause, that if the ship should be taken by the enemy, &c., the bond should be void. The ship was captured and recaptured, and afterwards arrived at her destination, and earned her freight. Held, that the obligee was entitled to recover upon the bond.

There is no average or salvage on a bottomry bond.

THIS was an action on a bottomry bond for £600 and upwards, which contained a clause, that if the ship should be taken by the enemy, cast away, miscarry, or be lost, before her safe arrival at New York, the bond should be void. The defendant pleaded, 1. *Non est factum*; 2. That the ship did not arrive at New York, her port of destination; and, 3. That the ship was captured. Issue was joined upon the two first pleas, and to the last the plaintiff replied a recapture. On the trial, the following appeared to be the facts of the case.

The voyage was from the Tagus to New York. The ship was taken, on her passage to New York, by a privateer; and afterwards retaken and carried to Halifax, where part of the cargo was sold for salvage and repairs. The amount of the latter was very considerable. The vessel afterwards arrived at New York with the remainder of her cargo on board. The ship and freight were then worth the sum in the bond, but not worth that sum together with what had been laid out in repairs. A verdict having been found for the plaintiff, *Haworth* obtained a rule *nisi* for a new trial.

Wallace, Lee, and Piggot showed cause.—This was not a total loss, but only an interruption of the voyage; and the subject-matter remaining, the money must be paid. There is no salvage or average on a bottomry bond. It is in the nature of a wager on the ship's arrival, and here the ship has arrived.

Haworth and *Baldwin*, contra.—The lender looked to the vessel and the freight which she should make as his only security. The vessel being taken and plundered, and a great part of her cargo lost, the security was destroyed, notwithstanding the recapture. On her arrival at Halifax after recapture, the vessel was worth no more than £225; and in order to fit her to proceed on her voyage to New York, £500 was laid out upon her. Suppose New York were in the hands of the enemy, and the vessel carried in there, could it be said that she had completed her voyage? The voyage from Halifax to New York was a new voyage, *undertaken for the benefit of the underwriters. It was necessary to aver in the declaration, that the ship and freight, on the arrival, were worth the sum in the bond, which was not the fact. [Lord MANSFIELD.—What obstruction would be sufficient to put an end to the bond?] Every obstruction that would make the ship unable to pay. [BULLER, J.—That would be going too far; but I doubt whether the case is not within the provision of the bond, which says, "loss, capture, miscarriage, or being cast away."] *Cur. adv. vult.* [*165]

Lord MANSFIELD delivered the judgment of the Court.—This was an action of debt on a bottomry bond, to pay the money therein mentioned within a certain time after the safe arrival of the vessel at New York. The bond contained a clause, that if the ship should be taken by the enemy, cast away, miscarry, or be lost, before her safe arrival at New York, the bond should be void. The ship was taken, in the course of her voyage, by two American privateers, kept by them above a month, and plundered. She was then retaken, carried into Halifax, restored, and salvage paid. A considerable

¹ S. C. Park Ins. 568, 6th ed.

able sum of money was laid out in repairing her. She proceeded to New York, and arrived there. She earned her freight, but the value of the ship at New York was not sufficient to answer the bond. It was admitted, that on a bottomry bond there is no average or salvage; but it was contended that the case came within the words of the clause, making the bond void in case of capture by the enemy. But, on consideration, we are all of opinion, that the taking by the enemy there contemplated does not mean merely a temporary taking, which is only an obstruction. To come within the clause, it must be such a taking as constitutes the loss of the ship, and which would amount, between the insurer and the insured, to a total loss. Here there was no such total loss. The vessel earned her freight, and is safe. Either way it is a hardship; but the law allows no average or salvage on bottomry bonds, and the rule must therefore be discharged. Rule discharged.

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*ANTHON *v.* FISHER.¹ Nov. 21.

Action on a ransom-bill containing a clause, that the bill should be enforced though the hostage should die, or the vessel be retaken. Plea, that before the captor got into port he was taken, with the hostage and ransom-bill on board; and being required to deliver up all papers, fraudulently did not deliver up the ransom-bill. —Demurrer. Held, by Lord MANSFIELD, that the plea was bad; but, by the other Justices, that the Court had no jurisdiction, this being a matter of prize, cognizable by the court of Admiralty.

THIS was an action on a ransom-bill containing the same clause as in *Cornu v. Blackburne*, B. R., E. 21 G. 3, ante, vol. ii. p. 641, relative to the payment of ransom, though the hostage should die, or the vessel, with the hostage on board, be captured. The defendant pleaded, 1. The general issue; 2. That the privateer, soon after the capture, and before it got into any French port, was taken with the hostage and ransom-bill on board, when the plaintiff was required to deliver up all the papers and ransom-bills on board, but that he fraudulently and deceitfully did not deliver up the ransom-bill upon which the action was brought. Demurrer to the second plea, and cause assigned that it amounted to the general issue. The case came on to be argued in Easter Term.

Law, for the plaintiff.—The general question in this case differs very little from that in *Cornu v. Blackburne*, which, with *Ricord v. Bettenham*, B. R., M. 6 G. 3, 3 Burr, 1734; 1 Blacks. 563, S. C., is the only case on ransom-bills. The sole difference between this case and *Cornu v. Blackburne* is, that here the ransom-bill is stated to have been on board, and that the captain, on being asked, refused to deliver it up, saying, fraudulently, that he had delivered up all papers. To make it fraudulent, some duty must be shown in the French captain to deliver up his property. But it is said by Grotius,² “that if a prisoner can conceal any part of his property, the captor does not acquire that portion, for he is, in fact, never in possession of it. Whence,” he continues, “it follows, that a prisoner may avail himself, to pay his ransom, of property which he has succeeded in concealing.” But supposing this concealment fraudulent, yet the same fraud existed in *Cornu v. Blackburne*; for the obligation to deliver up the property does not depend upon the demand, and in that case the Court determined that there was no such obligation. Was lenity the consideration for giving up the bill? The captor has no [*167] right to exercise force and cruelty. If he has a claim upon the property, he has none upon the veracity, of the prisoner.

¹ S. C. cited ante, vol. ii. p. 649 (n).

² Lib. 3, c. 21, s. 28; see also Burlamaqui's *Principles of Politic Law*, by Nugent, p. 302.

Baldwin, contra.—The present case differs in some material circumstances from *Cornu v. Blackburne*. In that case, which was argued upon a case stated, great stress was laid upon the clause in the ransom-bill respecting the capture of the hostage. It was also stated that the privateer had a commission from the French king, a fact which does not appear in the declaration in this case. Now, in order to maintain this action, it is necessary to show that the first capture was a legal capture, and the declaration ought to have shown that the plaintiff had a commission from the French king. Molloy, b. 1, c. 3. The plea charges the plaintiff with fraud, and the demurrer admits the fraud; the Court, therefore, will not render the plaintiff any assistance. It is said, on the other side, that there could be no consideration for the plaintiff's delivering up the ransom-bill. The captor had a right to search him; and if he forbore and treated him civilly, it was a good consideration for his promise to deliver up all papers. In *Cornu v. Blackburne* it does not appear that the ransom-bill was taken. In the present case it was brought into port. The stipulation is, that the ransom-bill shall stand good in case the vessel with the hostage on board shall be taken, but not in case both the hostage and the bill shall be taken; and it is admitted by the demurrer, that the vessel, hostage, and bill, were all taken. With regard to the passage cited from Grotius, it does not appear that the prisoner had been required to deliver up the property.

Law, in reply.—It is said that it does not appear that the privateer had a commission; but it is stated that the captain was a subject of the French king, and that he was captain of a privateer, which is sufficient. The demurrer does not admit the fraud. It admits the fact, but not the epithets. [Lord MANSFIELD.—In *Ricord v. Bettenham*, the question was, whether the hostage was the principal, or only a collateral security.]

The case standing over, Lord MANSFIELD, on a future day, said, I wish this case to be spoken to by Civilians. We can have no light from our own law. I have been looking into a French commentary on Colbert's *Ordonnance*,¹ *and I find, that if the privateer is taken with both the hostage and bill on board, the ransom-bill is discharged, because both together [*168] represent the ship. If the bill is sent on shore, and the hostage taken, still the ransom-bill is discharged; but if the hostage dies or deserts, it is not. At that time, however, there was no clause in the bill like the present, which does not, indeed, provide against the ransom-bill being taken, but only for the hostage dying, deserting, or being taken on board. I wish to know if any case has occurred in France of a ransom-bill on board, but, by fraud or accident, not found; and also where, and on what account, the clause was added.

Wood said, that it was introduced at the beginning of the present war, by the people of Boston, in New England, and was adopted by France.

In Trinity Term the case was argued by Dr. *Wynne* for the plaintiff, and by Dr. *Scott* for the defendant.

Dr. *Wynne*.—The facts of the dismissal of the ransomed ship, and of her arrival at her destination, are admitted; but the defendant pleads that the French privateer was taken with the ransom-bill on board, and that the plaintiff, her captain, was required to deliver up all papers, but that he fraudulently did not deliver up the ransom-bill. This plea admits the jurisdiction of the Court, and is to be taken as the defendant's whole defence. To determine the question raised by this plea, it will be necessary to inquire into the contract of ransom, whether it is a contract of a distinct nature, or whether it is to be ranked with other contracts. It is, in fact, a mere con-

¹ *Nouveau Commentaire sur l'Ordonnance de la Marine du Mois d'Août, 1681.* Par M. B. J. Valin. 1766.

tract of bargain and sale. During war, capture in general vests a property in the captor; and though there may be circumstances rendering the seizure illegal, as where the property is protected by a pass, in a neutral port, &c., yet here it is unnecessary to prove that the seizure was unaffected by any of those circumstances; for the ransom admits that the seizure was lawful according to the laws of war. The property having thus vested in the captor, he contracts, not as captor, but as vendor. The contract, then, stands thus:—The captor sells the ship captured, with a stipulation that she shall be free from a second *capture, as appears by the ordonnance of 1706, Art. 6 [*169] (see Valin, vol. ii. p. 286), and receives in return the ransom-bill; and equal justice requires that the bill also should be protected from capture. To hold otherwise would be a great hardship; and such a principle is not to be found either in the civil law or in any writer on the law of nations. A circumstance has been relied on which is only accidental, and not essential to the contract, viz., that hostages are commonly taken. It is said, in Molloy, B. 1, c. 8, s. 7, "If hostages are taken, he that gives them is freed from his faith; for that, in receiving hostages, he that receives them hath relinquished the assurance which he hath in the faith of him who gave them." No authority for this position is cited, but it is unnecessary to deny it, for the hostages here spoken of are clearly hostages given by one state to another. Between states it is true; for war is the only appeal in case of the contract being broken, and therefore hostages must be resorted to. But it is otherwise with regard to individuals, where the giving of hostages rather resembles a pledge, which does not exclude any other remedy upon the contract. *South Sea Company v. Duncombe*, B. R., M. 5 G. 2, 2 Str. 919; *Anon.*, B. R., E. 5 W. & M., Salk. 523. The rule is the same in the civil law. Dig. 12, b. 1, tit. *de rebus creditis*. It may be said that the contract of ransom being between enemies, the parties cannot resort to courts of justice, and are in the same situation as independent states; but that is a fallacy, since, for the purposes of this contract, they cease to be enemies. The contract was legal,¹ and must be recognised as such in the courts of both countries, though English privateers are prohibited from ransom by the prize-act, and though, by a statute passed since this transaction, and therefore not affecting it, merchantmen are forbidden to ransom. No writer on the law of nations treats this contract as of a special nature, nor is it laid down that either hostages or ransom-bills are essential parts of it. According to the law of nations, nothing is necessary but the agreement and the delivery in pursuance of it.

[*170] There is nothing in the common law of England contrary *to such a contract. The first statute restraining the power of ransoming is the 22 Geo. 3, c. 25; see also 33 G. 3, c. 66; 43 G. 3, c. 160, s. 34 & 35; and 45 G. 3, c. 72, s. 16 & 17; *Abbott on Shipping*, 347, 5th ed.; *Parsons v. Scott*, C. B., E. 50 G. 3, 2 Taunt. 363. Previously to that act instructions were issued, in 1744 and 1756, to privateers and men-of-war, to report to the Admiralty the ransom and the causes of ransom, which it was directed, should not take place without necessity. Formerly ransoms were not uncommon; and in the Admiralty books two cases are mentioned; that of the *Margaret of Nantz*, and that of *L'Heureuse Marie*. In the former case a French ship was taken and ransomed, and afterwards taken again (for a ransom does not necessarily protect to the ship's port). The second captor proceeding to condemnation, the first captor appeared, and produced his ransom-bill. The decree was, that the second captor should, out of the proceeds, pay to the first captor the amount of the ransom-bill. From this it may be inferred that the inte-

¹As to contracts made with an enemy by private persons, see *Burlamaqui's Principles of Politic Law*, by Nugent, p. 847.

rest of the captor is a permanent interest. It must be admitted that no case is to be found where the foreign ransomer has proceeded to recover his ransom in the court of Admiralty, though suits have been frequently instituted for salvage on recapture. These have been brought on the recapture of the hostage, which is a benefit to the owners in this manner. The hostage has a demand against, and may sue, the owners for the loss of his liberty, and therefore the recovery of his liberty by recapture is a benefit to the owners; see Valin, vol. ii. p. 287. In the case of the *George and Nelly*, cited ante, vol. ii. p. 646 (10th February, 1780), where a ship had been ransomed and a hostage taken, and the hostage had been retaken, the recaptor instituted a suit for salvage for the recapture of the hostage. The owners replied, that the ransom-bill did not come to the possession of the owner or of the hostage, and that it was not known what had become of it. It was suggested in argument, that the owner might make use of the ransom-bill. The judge condemned the owner in one-eighth of the ransom for the recapture of the hostage. The hostage, if taken to France, might have instituted a suit there against the owners for his delivery. It is too much to infer from this sentence that a suit might not have been instituted on the ransom-bill.

*The first case in this court is that of *Ricord v. Bettenham*, which, as far as it goes, proves that an enemy may sue on a ransom-bill. [*171] The next case was that of *Cornu v. Blackburne*, the facts of which, as will presently be shown, do not, in any material point, vary from this. In the court of Admiralty, the question is *res integra*.

It is material to consider the law of France as to ransoms. Valin published his *Treatise on Marine Ordonnances* in 1766. From that work it appears that the first of those ordonnances relative to ransoms was made in 1692; Valin, vol. ii. p. 282. Since that period various regulations have been introduced, chiefly with a view to prevent collusion between the French captors and their captures. A prescribed time is laid down within which the vessel shall arrive, otherwise the ransom is declared illegal. But no regulation is made respecting hostages or ransom-bills; and no inference can be drawn, that the ransom-bill is to be void on recapture. Valin does, indeed, give it as his own opinion that it shall, because the hostage and ransom-bill represent the ship and cargo; but no authority is given in support of this opinion, and the reason offered, when examined, will appear to be insufficient. He himself terms it a *pledge*; and if it be so, though the pledge be lost, the right in respect of which it was given remains. But there is an express condition here which renders this general reasoning unnecessary. There is a covenant in the bill that the owner shall pay the money, although the hostage should be retaken. The taking of the bill is immaterial, and it is omitted because it is immaterial, the hostage being of infinitely greater value. There might be ground for saying that the capture of the hostage should avoid the contract; and that, therefore, is provided for by special stipulation.

There is a suggestion of fraud in this case, in which it is said to differ from *Cornu v. Blackburne*. It is stated in the plea that the plaintiff fraudulently concealed the ransom-bill, and it is said that he shall not be allowed to take advantage of his own fraud. There are, however, some cases in which a man is permitted to take advantage of his own wrong, as in war. Here the captain of the privateer and of the *Aurora* were enemies throughout. By striking, the enemy only submits; but there is no obligation, either natural *or moral, which makes it incumbent upon the conquered to deliver up their property. Nothing can be stronger on this point [*172] than the authority of Grotius, B. 3, c. 21, s. 28, ante, p. 166. From this it appears clearly that concealment is not fatal. But then it is said that here

there is a fraudulent concealment. The answer is, that the captor had no right to require or to expect a true declaration. The parties were not *pares*. Could he who concealed be punished for the concealment? Heineccius, *Prælectiones upon Grotius*, l. 3, c. 18. In the contract of ransom, on the contrary, the parties acted *tantum amici et pares*, though under no obligation to do so; and it would be the greatest injustice if, having so acted, the Court here should refuse to enforce the contract.

Dr. Scott, contra.—The first objection on behalf of the defendant is, that this is a question of prize; and questions of prize or no prize belong to the Admiralty jurisdiction. It would have been more regular to have pleaded this matter in abatement; but it is of such a nature, that even yet advantage may be taken of it. The original act of ransom is strictly founded in war, and involves the question of prize or no prize, and cannot be resolved into a transaction of bargain and sale. To constitute such a contract there must be on the one side a right of property, and on the other a free power to purchase; but the capture does not alone vest the property. Various circumstances are necessary to complete the title of the captor;—in some cases condemnation—and, according to the law of some countries, twenty-four hours' possession. Nor has the captured free power to purchase, since, in general, a purchase from enemies is prohibited. Usually, at the commencement of a war, proclamations are issued forbidding such transactions. A military war and a commercial peace cannot co-exist. The capture is primarily an act of war; and the parties cannot immediately enter into a civil contract, as if the relation of public enemies did not exist between them. Ransom, then, is a contract *sui generis*, a military contract entered into between enemies. The rights of war are not abandoned, but are merely exercised in a different manner. According to the French law, ransom is considered to be a question of prize, and comes under the cognizance of the Admiralty courts; and there is every [*173] reason to regard it, in the English law also, as a question of prize, since it can only arise on recapture. In the case of the *Dunkirk*, in 1779, the ransom-bill was found on board. The proctor appeared, and prayed that it might be delivered up to found monitions on, and condemnation. This was in the Prize court. Cases have occurred, during the present war, in the Instance court, because in those cases the ransom-bills were not found, but only the hostages. Salvage, however, was decreed, as in the Prize court. In the course of the year 1758, the case of the *Antigua* merchant occurred. There a privateer was taken with the ransom-bill and hostage on board. Monition and sentence, that the hostage and ransom-bill were rightly retaken, and the captain was ordered to discover the owners. A bill was then filed in the Court of Chancery for a better discovery, but was dismissed on the ground that the cause belonged to the Court of Admiralty; and on its coming back to that court it was so admitted. On these grounds it is submitted that this is a subject of Admiralty jurisdiction.

But if this Court should be of opinion that they have jurisdiction, then the argument of the general question presents three points: 1. Whether a capture of the vessel with the ransom-bill found on board extinguishes the right of the first captor; 2. If so, whether the taking with the bill on board, but secreted, has the same effect; and 3. Whether that effect can be defeated by a special agreement between the parties.

1. The right of killing an enemy was converted, by the Roman law, into a right to his service. But the power over the liberty of a prisoner would be of little avail without the practice of ransom. The ransom of movables is of later introduction, and was probably copied from the practices of freebooters. Capture undoubtedly vests all corporeal property in the captor. *Grotius*, b. 3, c. 8, s. 4; *Puffendorf*, b. 8, c. 6, s. 22; *Vattel*, b. 3, c. 13, s.

196. So, on the taking of Naples by Charles VIII., that sovereign gave to his officers the bonds of the inhabitants. A ransom-bill, being a contract founded in violence, may, in like manner, be transferred by violence. It is transferred in the same way that it was created. A ransom-bill may be assigned with consent; but the enemy who takes it does not need such an assignment. He takes it *jure belli*. It is said that the ransom-bill is not the contract itself, but only evidence of the contract. It is indeed evidence, but it is something *more. Until reduced to writing, it was not assignable with consent; when reduced to writing, it is also assignable by violence. [*174] A bill of exchange, in the same manner, is both evidence of a contract and something more.

The recaptor might undoubtedly bring his action on the ransom-bill, as standing in the place of the first captor, were he not prohibited by domestic regulations. The state, in favor of the former owner, and by analogy to the case of a specific recapture, reduces his claim to a salvage. This is no hardship on the captor, for the ransom-bill only runs the same risk which the vessel itself must have run had no bill been taken. On these grounds it is contended that the right of the captor is extinguished by the capture of the ransom-bill, not because it is annulled, but because it is transferred.

With regard to the provisions of positive law, little is to be found on the subject of ransom in the ancient codes. The Rhodian laws speak only of pirates. According to Valin, there is nothing to be found as to legal capture and ransom in the law of France, except as to the ransom of persons, till 1692. In this country, as before stated, the courts of Admiralty have taken cognizance of the recapture of ransom-bills, as well as of ships. Although the ordonnances in the French Law Marine are silent on this point, yet it is treated of in the Commentary of Valin, which is not merely the opinion of the writer, but an exposition of the practice of the French courts. It is there laid down, that by the recapture the bill is not annulled, but passes to the recaptor. *Tout passe au preneur*.¹

Secondly, the effect of secreting the bill is to be considered. The civil law writers consider the captive as incapable of property. In modern times it is otherwise, and by the admission of the captor he has a capacity to acquire property. The taking possession of a ship is a taking possession of everything which that ship contains. By the French law, all papers whatever are to be brought in, and the prisoner is then interrogated whether there are any other papers. 2 Valin, 323. So, in English law, all papers are to be *sent to the Admiralty, and similar interrogatories are administered.² Being bound, therefore, to deliver up all papers, the retention of any is *mala fide*, and they shall be taken to be delivered up. [*175]

The third question arises on the effect of the special stipulation lately introduced into these instruments. It need not be said that the insertion of this stipulation proves that the parties thought the law made the recapture a discharge. But by omitting to provide for the recapture of the ransom-bill, they either meant to except the case, or thought that they could not include it. Suppose no ransom-bill given, but that the parties agreed between themselves that the vessel should not be recaptured, could such a stipulation bar the

¹ L'effet du billet de rançon est, par rapport, au preneur de lui donner droit, s'il n'est pas pris lui-même avec ce billet; car alors il perd sa rançon avec son propre navire, et le tout passe au preneur dont il est la conquête. Vol. ii. p. 286.

² In the "Regulations and Instructions relating to His Majesty's Service at Sea," (1734), is the following direction: "The captain is to cause the officers of the prize to be examined, and three or more of the company, who can give best evidence, to be brought to the court of Admiralty, together with the charter-parties, bills of lading, and other ship-papers found on board." By another direction, "When a privateer is taken, great care is to be had to secure the ship's papers." p. 90.

right of recapture? That right is a natural right, which no private agreement can take away. Any such agreement is void in law, as derogatory to the rights of third persons. Can the owner say, "I will not be retaken; I will continue a French prize?" The policy of this country has been to discountenance ransoming, which has never been allowed unless in cases of necessity; but if this clause should stand good, the property in the ransom would be absolutely secured to the captor, to the great benefit of the enemy.

Dr. Wynne, in reply.—With regard to the question of jurisdiction, if the proceedings of the courts of common law are in analogy with those of the Admiralty courts, such an objection is too late. In the latter courts the objection must be taken by protestation in the first stage, otherwise it cannot be insisted on. It is said that this is a prize-case, but in fact it bears no greater resemblance to a prize-case than if it were an action on the sale of goods captured, or for a share of prize-money in an agent's hands. There is no proceeding in the admiralty to condemn a ransom-bill. If that had been necessary, there would have been a condemnation of this bill in France prior to the action. It is true that some proceedings as to salvage on ransom have [*176] been had in the Prize court. Certainly some confusion exists in the practice, but it is probable that those cases were brought there because the ransom-bill remained in the register of that court, and its assistance was necessary; but they are regularly in the Instance court. It is said that there was *mala fides* in concealing the papers; but can English laws and regulations bind a subject of France? The French captain had a right to destroy the papers if he pleased. How can he be punished, either for destroying or withholding them? At the utmost he can only be refused a *cartel*, or other matter of favor; but no punishment can be inflicted upon him, as for an offence. The argument from policy is easily answered. The legislature, by its late enactments, has prevented all further mischief.

Curr. adv. vult.

Lord MANSFIELD, after stating the pleadings, and the particular clause in the ransom-bill, and remarked that there was no allegation in the declaration that the ransom-bill was on board, said,—When a ship is taken in war, and a composition is entered into between the captor and the captured to release the ship for a consideration, that is a contract on a reciprocal consideration. On the one hand the ship is released and protected for a time, and on the other hand the captured undertakes to pay the amount of the ransom-bill. If private faith should fail, the captor trusts to national justice. In *Ricord v. Bettenham*, and more lately in *Cornu v. Blackburne*, the Court enforced the payment of a ransom-bill. The defendant relies upon the facts disclosed by his plea; and the consequences implied from those facts are two: 1. That if the bill had been found, it would have been prize, and restored on salvage; 2. That the concealment by fraud amounts to an actual taking. Both these, as between the captor and owner, are merely questions of prize; but this ransom-bill has never been condemned, and we can adjudge nothing to be prize which has not been condemned as such in the court of Admiralty. For want of an averment of such condemnation, we are of opinion that the plea is bad, and that there must be

Judgment for the plaintiff.

It being understood that some of the judges did not entirely coincide in opinion with Lord MANSFIELD, the case was mentioned again.

*BULLER, J., and WILLES, J., desired to be understood that they [*177] did not concur in opinion with Lord MANSFIELD that this Court had jurisdiction. BULLER, J., said, that the cases cited in *Ricord v. Bettenham* went on particular grounds; that the cases of *Le Caux v. Eden*, B. R., H. 21 G. 3, ante, vol. ii. p. 594; and *Lindo v. Rodney*, B. R., H. 22 G. 3, ante, vol. ii. p. 613, n., depended on the principle that the Court has no juris-

diction in matters of prize, and that the objection might be taken in any stage. In confirmation of this, he mentioned the French opinions, from which it appears that the remedy by the French law is in the Admiralty Court. He said that this Court could not take cognizance, as the gist of the action, of a matter which could not be tried by the rules of the municipal law.

WILLES, Justice.—I certainly understood that the judgment would not be inconsistent with the general rule, that a question of prize or no prize is not within the jurisdiction of this Court. My opinion is, that we have no jurisdiction over that question; nor are we concluded by the authority of *Ricord v. Bettenham*, for the point was there given up, and not fully understood. Since the matter has been more maturely considered, the authority of that case has been shaken. The objection of want of jurisdiction may be taken after pleading in chief. I wish the case to be reconsidered.

ASHURST, Justice.—I think it better that the case should be further considered. I am not prepared to go into it at present so fully as I could wish. As at present advised, I agree with my brother BULLER. If this Court has no jurisdiction over the subject-matter, and it so appears on the declaration, it need not be pleaded, and may be taken advantage of at any period.

LORD MANSFIELD.—My own opinion is, that this is a question of contract, not merely not involving, but in its foundation giving up, the question of prize. Dr. Wynne has stated, that no suit ever was entertained in the Court of Admiralty on a ransom-bill, and that no such bill was ever condemned. Here the plea sets up that which never can appear but through the medium of a Court of Admiralty.

ASHURST, Justice.—If the collateral matter might have shown that this Court has no jurisdiction, but does not show it, and if this is a question on the contract singly, the Court *then has a jurisdiction, and judgment may stand for the plaintiff. [*178]

WILLES, Justice.—It appears on the declaration to be a contract made *flagrante bello*.

LORD MANSFIELD.—As we are likely to be divided, the best way is to give judgment for the plaintiff, and to let it go to a superior court.

Judgment for the plaintiff.

On this judgment error was brought in the Exchequer Chamber; and upon the argument, M. 25 G. 3, the Judges of the Common Pleas and the Barons of the Exchequer held that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war; and on that ground the judgment of this Court was reversed.¹

¹ The principle on which the reversal of this judgment proceeded, viz., that an alien enemy cannot sue in an English court, has been since frequently recognised. See *Brandon v. Nesbitt*, B. R., M. 85 G. 3, 6 T. R. 28; *Bristow v. Towers*, B. R., M. 85 G. 3, 6 T. R. 35. See also *Furtador v. Rodgers*, C. B., T. 42 G. 3, 3 Bos. & Pul. 200.

TAYLOR v. FENWICK.¹ Nov. 22.

In a notice of action against a Justice of the Peace, an endorsement on the notice of action, "given under my hand at Durham," is not a sufficient endorsement of the attorney's place of abode, within the statute 24 Geo. 2, c. 44, s. 1.

THIS was an action of trespass against a Justice of the Peace, to which the defendant pleaded the general issue. A notice of action was produced,

¹ S. C. cited 7 T. R. 635, 3 Bos. & Pul. 553, n.; Tidd's Pr. 27, 8th ed.

when it was objected that the place of abode of the attorney was not endorsed. It only expressed, "given under my hand, at Durham, this day;" and it was contended, that this did not show that the place of abode of the attorney was at Durham. There were other objections taken, on the ground that the conviction (which was for not obeying an order to pay money, to a militiaman, on certain churchwardens and overseers) was conclusive. The cause was tried at Durham, and a verdict found for the plaintiff.

On showing cause, the Court were of opinion that the statute (24 G. 2, c. 44, s. 1), having prescribed the form of *the notice, it must be [179] strictly complied with, and that this was not an endorsement of the name and place of abode of the attorney for the plaintiff, according to the directions of the Act. The Court therefore directed a nonsuit to be entered (according to the consent of the parties at the trial), although the time for bringing another action had expired. Nonsuit entered.²

¹The words of the statute are: "On the back of which notice shall be endorsed the name of such attorney or agent, together with the place of his abode." "Of Birmingham," has been held a sufficient description of the attorney's place of abode. *Osborn v. Gough*, C. B., M. 44 G. 3, 3 B. & P. 551. So "Bolton en le Moora." *Crooke v. Curry*, Durham Summer Ass. 1789, 1 Tidd, 28, n. 8th ed.; and in the same case it was ruled, that the attorney's name and place of abode being in the body instead of on the back of the notice, was sufficient. *Ibid.*

BARRY and Another v. NUGENT.¹ Nov. 22.

J. B., being wrongfully dispossessed of certain premises, executed the following deed: "Be it remembered that J. B. hath let, and by these presents doth demise to R. F. (the premises), as now held by W. F., for the full space or term of twenty-one years, to commence the first day of May or the first day of November, whichever first happens after the said J. B. recovers the said lands from the heirs, &c.; the said R. F. covenanting and agreeing, on the foregoing conditions, to pay to the said J. B., &c., the sum of, &c. Leases, with power of distress, and clauses of re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said J. B. recovers the lands," &c. Held, that this instrument operated as a present demise.

ERROR from the King's Bench in Ireland. This was an action of ejectment for lands in Ireland. At the trial the lessor of the plaintiffs proved that the lands in question had been, in the year 1751, and before the reputed estate of the defendant in ejectment, Barry; that, in 1730, a lease of them had been made by James, Earl of Barrymore, the defendant Barry's father, and under whom he claimed, for twenty-one years to Matthew O'Hea; and that J. C., the agent and receiver of the defendant Barry, received for his use the yearly rent, reserved and made payable by the said lease, from 1747 to 1751, when the lease expired; that on the expiration of the said lease for twenty-one years, the actual possession of the said lands was demanded by the said J. C., as agent for the defendant Barry, from the said Matthew O'Hea, or his personal representative, who refused to deliver up possession, claiming a title to the fee simple and inheritance thereof; that [180] the actual *possession of the said lands had been withheld from the defendant Barry by the said O'Hea, or his representative, from the expiration of the said lease to 1779, at which time the said M. O'Hea, or his representatives, in consideration of £500, released all his right to the defendant Barry, who then obtained the actual possession of the said lands; and that he, by the other defendant Deasy, his terre-tenant, is now in possession thereof; and thereupon the plaintiffs' counsel produced

¹S. C. cited 5 T. R. 165.

and offered in evidence a lease, or instrument in writing, bearing date the tenth of August, 1751, from the defendant Barry to R. Fuller, his executors, &c., whose personal representatives the lessors of the plaintiffs now are, purporting to be a demise for twenty-one years of the lands in question: whereupon the defendant's counsel insisted that sufficient evidence had not been laid before the Court to entitle the plaintiff to read the said instrument; which objection the Judge overruled, and the defendant's counsel excepted thereto. The instrument of the tenth of August, 1751, was then given in evidence, and was as follows, viz.: "Be it remembered, that the Right Hon. J. S. Barry, for himself, his heirs, &c., hath set, and by these presents doth demise unto the said R. Fuller, his executors, &c., the premises, in question, as now held by W. F., for the full space and term of twenty-one years, to commence the first day of May or the first day of November, whichever first happens after the said Barry, his heirs, &c., recover the said lands from the heirs, &c., of M. O'Hea, deceased; the said R. Fuller covenanting and agreeing, on the foregoing conditions, for himself, his heirs, &c., to pay to the said J. S. Barry, his heirs, &c., the sum of £110 yearly during the said term, in two equal payments, on the first of May and first of November; leases, with power of distress and clauses for re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said Barry recovers the lands from the said O'Hea's representatives. In witness whereof the parties have put their hands and seals this tenth day of August, 1751. J. S. Barry. [L. s.]" Whereupon the defendant's counsel insisted that the said deed did not contain a legal demise, and that there had been no evidence of possession under it; but the Judge declared and delivered his opinion to the jury, that the several matters so insisted on, on the part of the defendants, were not, on the whole case, sufficient *to bar the plaintiff of his said action, and with that direction left the same to the jury, who gave a verdict for the plain- [*181] tiff; whereupon the defendant's counsel objected to the Judge's said opinion, and the Judge sealed a bill of exceptions, which bill of exceptions the Judge having acknowledged his seal thereto before Lord ANNALY, by virtue of a commission sent from hence to him to receive such acknowledgment, together with the record, was brought by writ of error into the Court of King's Bench here.

Bower, for the plaintiff, in error.—The instrument offered in evidence did not import a present demise, but was only preparatory to a lease to be made at a future time. Though present words are used, yet if the intent appears to be otherwise, they will not pass a present interest. The situation of Barry at the time of the instrument being executed shows that he could not intend a present demise. At that time he was out of possession, and the tenant "covenanting and agreeing on the foregoing conditions," instead of stating it as a consideration, proves the contemplation of a future demise. That demise was only to take place in case Barry recovered the lands, an event which never happened; for, twenty-eight years after the execution of this instrument, he acquired the premises by purchase. This is not one of the cases where a present interest is meant to be given, and the lease to be executed afterwards is only for further assurance, as in *Maldon's case*. B. R., T. 26 Eliz., Cro. Eliz. 33. The covenants to be entered into here are by the lessee, and are not for his further assurance, but are intended for the benefit of the lessor, and are to form the consideration for the future demise. In *Harrington v. Wise*, B. R., M. 37 & 38 Eliz., Noy, 56, Cro. Eliz. 486; and *Abrahall v. Brown*, C. P., H. 15 G. 3, 2 Blacks. 974, there were circumstances decisive of the intent that the instrument should operate as a present demise; thus, in the former case, the tenant was to enter immediately, and the formal lease was to be made after the entry. The latter

case also proceeded on the ground of the receipt of rent by the lessor. He also cited *Sturgeon v. Painter*, Noy, 128, and 1 Roll. Ab. 848, pl. 3.

Chambre, contra.—Both by the words and by the intent, as collected from [*182] the words, and according to the authorities, *this was a present demise. Not only are the words of the present, but past: "hath demised and doth demise." The case of *Sturgeon v. Painter* was only a *Nisi Prius* decision; and the memorandum added to the instrument, that the articles were to be altered by counsel, showed it to be merely executory, as was also the case cited from Rolle. The cases for the defendants in error have been already mentioned in the argument on the other side. Maldon's case was not so strong as this, for there were in that case no words of present demise. In *Harrington v. Wise*, the word *provided* is used, which is the same as *on condition* in the present instrument. The instrument in *Abrahall v. Brown* is as nearly similar as possible to the present, and is a recent confirmation of the doctrine.

Lord MANSFIELD.—Mr. *Chambre*, you seem to have overdone it. The cases you have cited are as strong, or stronger than this; and the Court always leans, in the case of a lease, to execute it. Do you remember the case of Sir W. Yea? Weakly, dem. *Yea v. Bucknell*, B. R., M. 7 G. 3, Cowp. 473. Judgment affirmed.¹

¹See the observations on the case in *Doe v. Ashburner*, B. R., H. 38 G. 3, 5 T. R. 167; and *Doe v. Groves*, B. R., H. 52 G. 3, 15 East, 247. See also the cases of *Goodtitle v. Way*, B. R., E. 27 G. 3, 1 T. R. 735; *Doe v. Clare*, B. R., M. 29 G. 3, 2 T. R. 739; *Doe v. Smith*, B. R., T. 45 G. 3, 6 East, 530; *Poole v. Bentley*, B. R., H. 50 G. 3, 12 East, 168; *Tempest v. Rawling*, B. R., M. 51 G. 3, 13 East, 18; *Hegan v. Johnson*, C. B., M. 50 G. 3, 2 Taunt. 148; *Morgan v. Bissel*, C. B., T. 50 G. 3, 3 Taunt. 65; *Dunk v. Hunter*, B. R., H. 2 G. 4, 5 B. & A. 322; *Colley v. Streston*, B. R., M. 4 G. 4, 3 D. & R. 522; *Hammerton v. Stead*, B. R., M. 5 G. 4, 3 B. & C. 481, 5 D. & R. 210, S. C.; *Wright v. Trevisant*, *coram Bosc.*, C. J., 1828, 1 M. & M. 231; 3 Car. & Payne, 441, S. C.; *Chambers's Landlord and Tenant*, 278.

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*BLAMEY v. WHITAKER.¹ Nov. 23.

Where turnips are drawn in small quantities at a time, the tithe may be set out by placing aside every tenth turnip; and it is not necessary to place the tithe in heaps, unless the farmer gathers his turnips into heaps for himself.

This was an action against a parson for not taking away the tithe of turnips after they were set out. The cause was tried at Truro before PERRY, B., when it appeared that the turnips were pulled as the farmer wanted them, to feed his bullocks; and as they were pulled, every tenth turnip was thrown on the opposite side for the parson, he having given notice that he would require them to be set out in kind as they were gathered from the ground. A verdict having been found for the plaintiff, a rule for a new trial was obtained in Easter Term last, when Lord MANSFIELD recommended a compromise, and the rule was enlarged. The compromise having gone off, the case was argued in this term by

Kirby, Sergeant, and *Lawrence*, for the plaintiff.—The mode adopted of setting out the tithe was the right and only mode. It was left to the jury to say whether it was or was not a reasonable mode of setting them out, and the jury have determined that it was reasonable. It is also agreeable to the notice given by the defendant, and no fraud appears. It is contended on the other side, that the turnips ought to have been set out in heaps; but if that

¹S. C. cited 10 East, 12 nomine *Blaney v. Whitaker*; but the judgments of *ARMISTEAD*, J., and *BULLER*, J., are alone given.

had been done they would have heated. The case of *Beaumont v. Shilcot*, Scacc., H. 8 G. 3, 2 Eagle & Y. 226; 2 Gwill. 944; 8 Wood's Decr. 171, S. C., was relied upon by the other side; but that decision is, in fact, in favor of the plaintiff, for, according to that case, turnips ought to be set out in heaps where they are gathered in large quantities, but where they are gathered in small quantities the tenth turnip ought to be set out. There is no other principle in setting out tithe than that a tenth part shall be given. Produce not susceptible of exact division, as grass and corn, is divided in a gross manner by heaps, but this is only a medium of dividing equally, and is not necessary where a more exact mode is practicable. Another objection is made that cattle were turned in before all the turnips were tithed, and that therefore the action is *not maintainable, and *Shapcott v. Mugford*, B. R., E. 9 [*184] W. 3, 1 Ld. Raym. 187, was cited; but that decision can only apply where the species of tithe is such that the whole may be tithed at once. The mode of cultivation in this case will not admit the keeping out the cattle so long as in corn ground. In fact the field was months in tithing. If the tithe was well set out, the tenant was not bound to do anything more for the convenience of the parson. 1 Roll. Ab. 644, pl. 6.

Batt, contra.—There are two grounds upon which this rule ought to be made absolute: 1. The mode of tithing was unreasonable; and the question of reasonableness, which is a question of law for the Court, was improperly left to the jury. 2. By turning in his cattle, and taking justice into his own hands, the plaintiff destroyed his right of action. The case of *Beaumont v. Shilcot* is in point for the defendant. The result of that case is, that where turnips are gathered in such quantities as to admit of being put into heaps, they shall be so for the benefit of the parson. *Walton v. Tiers*, Dom. Proc. 1753, 5 Bro. P. C. 99; 3 Burn's E. L. 492, shows, that in some cases the farmer shall be at the expense of labor for the benefit of the parson. There is a great expense in picking and sorting hops, yet in that case it was held by the House of Lords, that to prevent fraud, the tithe should be taken after that operation. So in the case of corn, it must be put into sheaves before it is tithed. No case is to be found on the mode of tithing potatoes, but it is understood that the practice is to tithe them by measure. If this is not a question of law, every jury may establish a different mode. [LORD MANSFIELD.—To be sure, what is a reasonable mode of tithing is a question of law, and not a question of fact, to be left to the jury; but if the jury have determined it according to law, the Court will not grant a new trial.] Here the turnips were drawn by ridges about fifty feet in a day. It was said by one witness, that the expense of collecting the tithe would have been about one penny a-day, and that the value of the tithe was sixpence a-day. Upon the second point, *Shapcott v. Mugford* is expressly in point. The plaintiff had no right to turn his cattle upon the land until all the turnips were severed from the ground.

LORD MANSFIELD.—This action is vexatious; but the *question is, [*185] Whether the plaintiff can recover at law? It is objected, that he is barred by having taken his own remedy; but there is no ground for that objection. Upon the other question I am under great difficulty, and if *Beaumont v. Shilcot* does not decide it, we must consider the general reasoning. The usual rule certainly is, that the farmer is not bound to be at any expense for the benefit of the parson. If he sets out his own in heaps, he ought also to set out the parson's in heaps; but here, if he had set out the parson's share in heaps, it would have been labor expended merely for the parson. If there is any difference of opinion I should be glad to consider it further.

WILLES, Justice.—The case in the Exchequer seems to determine, that if the quantity is sufficient to be put into heaps, the farmer shall put it into heaps. Here the parson's tithe each day is said to have been worth sixpence,

and that quantity, I should think, would make a heap. To oblige the parson to gather them together is taking away one-sixth of his tithe. I think, that where there is enough to make a tenth heap, it ought to be set out. The farmer might have left the tenth wheelbarrow full, and have thrown them together.

ASHURST, Justice.—The safe rule is, that whatever degree of industry the farmer must use, before he carries away the produce, he must use for the benefit of the parson as well as for his own; but he is not bound to bestow any additional labor. Thus, in hay¹ and corn, the farmer must put it into cocks and sheaves for his own benefit, and therefore he shall do the same for the parson. In gathering a whole field of turnips they must be thrown into heaps: but here the whole field was not gathered at once, and therefore I think the farmer was not bound to do that for the parson which he did not do for himself. This agrees with the decision, and the case in Rolle is strong that way.

BULLER, Justice.—As to the last objection made on the part of the defendant, that the plaintiff has in part taken his remedy into his own hands by turning in his cattle, it is *stricti juris*, and it is sufficient if the plaintiff has suffered damage for any part of the time laid in the declaration. As to the [*186] other objection, I agree entirely with my brother *ASHURST. I think, that if the farmer puts the turnips into heaps for himself, he must also do so for the parson; but that if he does not do so for himself, he need not do so for the parson. Indeed, I think it is the fairest way for the parson to set the tithe out by single turnips; whether they be small or great is a matter of chance; and as to fraud, that is an objection not to the mode, but to the conduct of the party. Where the turnips are set out by the farmer in heaps, then, of course, the most convenient mode is to take the tithe in heaps. The rule of law is, that the first opportunity is to be taken of dividing, as soon as the matter is in a proper state to be tithed. Corn and hay cannot be fairly divided till in heaps, for the size of the swathe depends on the strength of the mower and on other circumstances. I think, that taking the tenth wheelbarrow would not be a fair way.

Lord MANSFIELD.—Let the rule be discharged. If we change our minds we will let you know.
Rule discharged.²

¹ Hay is titheable in the grass-cocks after having been teded. *Newman v. Morgan*, B. R., T. 48 G. 3, 10 East, 5.

² The turnips must be set out in the place where gathered. Where potatoes were carried off the field into a brewhouse, and there measured and set out for the parson, it was held not to be a due setting-out of the tithe. *Bosworth v. Limbrick, Seac.*, M. 18 G. 3, 2 Eagle & Y. 310; 3 Gwill. 1110, S. C.

The principal case appears to coincide with that of *Beaumont v. Shileot*, although the mode in which the turnips were gathered (whether in small or large portions) is not particularly stated. ADAMS, B., says, "The parson is to have the fair and full tenth. There is no particular rule yet laid down for setting out the tithe of turnips. The setting out single turnips is liable to great fraud. If a whole field or whole acre be gathered at one time, they may well be set out in heaps; but if only a few are gathered at a time, that method cannot be observed. In that case single turnips must be set out."

BARNES, Assignee of SANDERS, v. MATON.¹ Nov. 26.

Where an action is pending at the suit of a bankrupt, and the assignees arrest the defendant for the same cause of action, it is not vexatious. Assignees cannot make themselves party to a suit commenced by the bankrupt before interlocutory judgment.

THIS was a motion to discharge the defendant on common bail; he having

¹ S. C. cited by Lord ELLENBOROUGH, 15 East, 681.

been held to bail by the assignees of a bankrupt, and having previously given bail in an action by the *bankrupt himself. *Bearcroft* moved it on a former day, but the Court thinking the bankruptcy an abatement, [*187] and that the assignees were compelled to commence the suit again, refused the motion. *Bearcroft* renewed his application, and cited *Bibbins v. Mantell*, C. B., M. 8 G. 3, 2 Wils. 358, 372, and *Mayo*, assignee of *Heron v. Gregory*, B. R., T. 1777. [BULLER, J., inquired, whether there was any interlocutory judgment in these cases. *Bearcroft*.—In *Bibbins v. Mantell* there was, but not in *Mayo v. Gregory*. Lord MANSFIELD.—After an interlocutory judgment the assignees may make themselves parties to the suit by *sci. fa.*; but how can they do so here? *Bearcroft*.—They may perhaps do it by suggestion on the record.] A rule to show cause having been granted,

Mansfield showed cause. [BULLER, J., read a note of *Bibbins v. Mantell*, fuller than the report in *Wilson*, in which WILMOT, C. J., said, that if the bankruptcy happened before the interlocutory judgment, the assignees could not proceed.]

Bearcroft, contra.—It is enough, in order to sustain this application, to show that the assignees might have proceeded, if they had so chosen, in the name of the bankrupt; and it is immaterial that they had also the power of proceeding in their own names. If the first action might have been carried on, the second is vexatious. The only difficulty is, that the defendant might plead the bankruptcy of the plaintiff; but if it should be made to appear that the assignees are carrying on the action for their own benefit, the Court would not suffer such a plea to be put in.

Lord MANSFIELD.—The second arrest is not vexatious, unless the assignees could have proceeded in the action commenced by the bankrupt. Now, the defendant might have pleaded the bankruptcy of the plaintiff, and the Court could not have set aside a plea which was a legal bar.

Rule discharged.¹

¹ See *Kinnear v. Tarrant*, B. R., E. 52 G. 3, 15 East, 622; *Biggs v. Cox*, B. R., M. 6 G. 4, 7 Dowl. & Ry. 409; 4 B. & C. 920, S. C.; *Minchin v. Hart*, B. R., H. 49 G. 3, 1 Chitty, 215. But it seems that where the defendant has been arrested in an action brought in the name of the bankrupt, but by the authority of the assignees, he cannot be afterwards arrested at the suit of the assignees for the same cause of action, unless the first action has been discontinued, or the costs paid. *Carter v. Hart*, B. R., E. 59 G. 3, 1 Chitty, 276; *Tidd*, 176, 8th ed.

*BEST v. BARBER.¹ Nov. 26.

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Where a debtor is discharged under an insolvent act, and afterwards gives a promissory note for a debt due before, there is a good consideration for such note, and he may be sued upon it.

MOTION to set aside an execution against the goods of the defendant, who had been discharged under the insolvent act of 1781, by which act the future effects of the bankrupt are protected, except money in the funds. The execution was in an action on a note given by the insolvent after his discharge, for a debt due before. A rule to show cause having been granted,

Haworth showed cause, and *Mingay* having been heard for the rule, the Court took time to consider.

Lord MANSFIELD.—We have considered this question, which arises on a note given by a discharged insolvent for a debt due before. There are several cases in which the principle has been established, that where the statute

¹ S. C. nomine *Best v. Barker*, 8 Price, 533.

takes away the remedy, but the debt still remains, that debt is a good consideration for a subsequent promise. It is so in the case of a debt on which the statute of limitations has run. So, also, with respect to promises made after bankruptcy, or after a discharge under an insolvent act for debts due before. There is a case of this sort before Lord HARDWICKE.

Rule discharged.¹

¹ As to holding the defendant to bail on such a promise, see *Wilson v. Kemp*, B. R., H. 50 G. 8, M. & S. 595; *Horton v. Moggridge*, C. B., E. 56 G. 8, 6 Taunt. 563; *Blackbourne v. Ogle*, Scacc., M. 1 G. 4, 8 Price, 526; *Peers v. Gadderer*, B. R., M. 8 G. 4, 1 B. & C. 116; 2 Dowl. & R. 240, S. C.

WETHERELL v. HALL.

(Reported, CALDECOTT, 230.)

[*189] *CLARKSON v. WOODHOUSE and Another.¹ Nov. 27.

Trespass for breaking and entering three closes in Stalmine. Pleas in justification:

1. A right of common of turbary; 2. Of pasture. Replication, that the closes are parcel of Stalmine Moss, within the manor of Stalmine; that there are divers ancient messuages which have had common of turbary and pasture upon the waste. The replication then stated a custom within the manor of Stalmine, for the owners of Stalmine Moss, by themselves, or their moss-reeves, to assign to the owners of such ancient messuages certain reasonable proportions of the moss-dales, to be by them held in severalty, for the purpose of getting turves; and after the moss-dales shall have been cleared, the owners of the moss shall hold the same in severalty, discharged from all common of turbary and pasture. The replication then stated the clearing and approvement of the closes accordingly. Rejoinder, traversing the custom, and verdict for the plaintiff. On motion in arrest of judgment it was objected, 1. That the custom was bad, as extending to messuages without the manor; 2. That it was bad, as repugnant to the right claimed in the plea; 3. That it was bad, as not being stated to extend to all the ancient messuages; 4. That it was bad, in stating that "reasonable proportions" were to be assigned. Held, that the custom, as stated in the replication, was good.—Counterparts of old leases from the repository of a lord of a manor are evidence of the demise of the premises, without proof of enjoyment.

THIS was an action of trespass for breaking and entering three closes of the plaintiff, lying in Stalmine, in the county of Lancaster. The pleas were, 1. Not guilty; 2. A justification in right of an ancient messuage in Stalmine, to take turbary for fuel in, upon, and through Stalmine Moss, lying in Stalmine aforesaid; and, 3. A justification in right of an ancient messuage and lands in Stalmine for common of pasture, in, upon, and throughout Stalmine Moss, lying in Stalmine aforesaid, for commonable cattle, levant and couchant. Replication, that the closes in which, &c., are parcel of Stalmine Moss; that Stalmine Moss is within the manor of Stalmine; and that there are divers ancient messuages as well as defendants', which, from time whereof, &c., have had common of turbary in and upon the said waste or common (except such parts thereof as have been approved and enclosed, in manner hereafter mentioned, after such approvement and enclosure of such parts respectively), to dig and take turves in and upon the said waste or common (except as aforesaid) for their necessary fuel, to be burnt and consumed in their respective messuages, every year, at all times of the year, as occasion hath required; and also common of pasture in, upon, and

¹ S. C. 5 T. R. 412 (n).

throughout the said waste or common called Stalmine Moss, whereof, &c. (except the said respective parts thereof which have been approved and enclosed, in manner hereinafter mentioned, after such approvement and enclosure thereof), for all their commonable cattle, levant and couchant, in and upon the said respective messuages and lands. And the replication further stated, that within the manor of Stalmine aforesaid, there has been a custom, that the owners of the waste or common called *Stalmine Moss, for the time being, by themselves or their superintendent of [*190] the said waste or common for the time being, called the moss-reeve, from time whereof, &c., have, from time to time, as occasion has required, set out and assigned, and have been used, &c., and of right ought, &c., to set out and assign to the several and respective owners and occupiers of such ancient messuages and lands, upon their reasonable request in that behalf, certain reasonable parts and proportions of the said waste or common, commonly called moss-dales, to be by them respectively held in severalty, exclusively of all others, for digging and getting turves therein for their necessary fuel, to be burnt and consumed in such their respective messuages every year, at all times of the year, as to such their respective messuages belonging and appertaining; and that the respective owners and occupiers of such ancient messuages for the time being, for all the time whereof, &c., have dug and got, and have been used and accustomed to dig and get, and of right ought to have dug and got, and still of right ought to dig and get, such turves for their necessary fuel, to be burnt and consumed in such their respective messuages as aforesaid, in such their several and respective moss-dales so to them assigned and set out as aforesaid, and in no other part or parts of the said waste or common, so long as any turbary has remained, or shall remain, in such respective moss-dales so assigned and set out; and when and so often as the turbary of such moss-dales, so assigned and set out as aforesaid, has been, or shall be, got and cleared therefrom, by such digging and getting of turves for the purposes aforesaid, the owners of the said waste or common called Stalmine Moss, for the time being, for all the time whereof, &c., have enclosed and approved to themselves, and of right ought to enclose and approve to themselves, all such moss-dales, or other parts of the said common or waste called Stalmine Moss, as have been, or shall be, cleared as aforesaid, commonly called the following ground thereof, and to hold the same so enclosed at their pleasure, in severalty, for ever afterwards, freed and discharged from all common of turbary and pasture thereon. The replication further stated that A. and others were seised of moss, and being so seised, enclosed and approved the closes, being moss-dales, cleared in manner aforesaid, and demised to the plaintiff. The rejoinder traversed the custom stated in the replication, on which issue was joined. The *cause was tried at Lancaster, before EYRE, B., when, on the part of the plaintiff, [*191] counterparts of several old leases were produced in evidence from the lord's repositories, by which former lords had granted portions of the moss or waste. The oldest of the leases produced was dated in 1680, and the latest of those admitted in evidence was dated 1702 or 3. A lease dated in 1730 was rejected. No evidence of enjoyment under these leases was given. The jury having found a verdict for the plaintiff, a new trial was moved for, on the ground that the evidence of the old leases had been improperly admitted.

Lord MANSFIELD said, and the whole Court agreed with him, that these old leases were proper evidence to show, that, at that time, the lord of the manor did in fact demise the ground; and that this was very different from the case of *Smith v. Lord Pomfret*, 7 Bro. P. C. 440, where, the question being on boundaries, a conveyance by Lord Pomfret, or his predecessor, was

offered to prove, from the description contained in it, that the place in dispute was within his manor. His lordship added, that it was impossible to give evidence of enjoyment under such old leases; see *Rogers v. Allen*, cor. HEATH, J., 1808; 1 Campb. N. P. C. 309; 1 Phill. Ev. 240, 6th ed. The rule for a new trial was consequently refused.

The defendants then moved an arrest of judgment on four grounds; 1. That the custom set out in the replication is laid to be within a manor, and yet is made to extend to something without the manor, the messuages to which it is applied not being stated to be within the manor; 2. That the custom stated in the replication is repugnant to the right claimed in the plea; 3. That the custom is not stated to extend to all the ancient messuages, even if within the manor, but only to divers ancient messuages; 4. That *reasonableness* is not sufficiently certain.

Wallace, Davenport, and Topping, having been heard in support of the rule,

Lee, Wilson, Chambre, and Wood, showed cause.—The first objection is, that the custom is laid in the manor, and claimed to be enjoyed by persons residing out of the manor. There is no case to be found which establishes this objection. Lord COKE says, that a custom must arise from act of parliament, *and not by grant. [Lord MANSFIELD.—He must mean, [*192] that where a custom is proved which is unreasonable, and could not arise from a grant, the Court will presume an act of parliament to support it.] 2. The custom stated in the replication is not inconsistent with that in the plea. The plaintiff does not negative the general right of common; he only says, that where the moss has been cleared away the general right is not to be exercised. 3. The Court will not, after verdict, presume that there are any ancient messuages to which the custom will not apply. *Bull v. Steward*, B. R., M. 23 G. 2, 1 Wils. 255. 4. "Reasonable parts and proportions of the said waste" is sufficiently certain. In *R. v. The Inhabitants of St. Michael*, B. R., T. 10 G. 3, 2 Blackst. 718, the judgment was, contrary to the report, affirmed. [BULLER, J., said he had a note of that case, and the judgment was in fact affirmed.] They also cited 15 Ed. 4, 29, 1 Roll. Ab. 565; Thom. Ent. 327, 410; Copyhold Cases, 4 Rep. 32; *Wigglesworth v. Dallison*, B. R., T. 19 G. 3, ante, vol. i. p. 201.

Lord MANSFIELD.—Although the objections stated were on the first view specious, yet, on considering the effect of them, there is little room for doubt. The first objection is, that it is not alleged that the ancient messuages lie within the manor of Stalmine, but only within Stalmine; that is, within the vill of Stalmine. The replication does not in fact state that they are all within the manor; and it is upon that urged that the custom must be void, as extending out of the manor. The objection, however, fails, if the distinction between a prescription and a custom is attended to. Where an individual claims an immemorial right to any estate or privilege without attempting to show any other title than that which arises from the presumption derived from such an uninterrupted enjoyment, that is a prescription in him; but if there exists a general rule of property defined within certain limits and local descriptions, this rule, whether of property, or policy, or civil proceeding, becomes the law of the place, governing all property situated within those limits, in whatever place the owner of that property may happen to reside. Thus all property lying in England, whether enjoyed by a native or by a foreigner, must be regulated by the law of England, and [*193] the possessor must take it subject to *that regulation, and in no other manner. If an estate be within a manor, the custom, which is the law of the manor, directs the estate: so where land is devisable by the custom of particular boroughs, the law of the place regulates the enjoyment.

In the present case, all the moss lies within the manor, and is to be governed by the custom of the manor. The second objection was, that the qualification set up in the replication is repugnant to the right stated in the pleas; for that, by the custom alleged by the plaintiff, all the turbary, as well as the pasture, may in the end be destroyed. But a repugnancy to destroy a custom must be such as, by the contradiction of the terms appearing on the statement of the right and custom together, virtually implies that the custom could not subsist, because the right which establishes the one negatives the other, which is incompatible with it. Thus a sheep-walk implies that the lord shall not enclose at his pleasure; for if he does, there can be no sheep-walk. But in this case there is no such inconsistency, for the custom might have been a reservation in the original grant, and the right might have been restricted within those limits by the original agreement. For a reservation in a grant no consideration is necessary, since, when the whole is an act of bounty, it is sufficient that so much and no more was given. The other objections were not much insisted upon in argument. The law will at all times restrain the lord from an arbitrary and excessive use of his power; and the fuel being in this case to be consumed in the houses, furnishes a limit and a test whereby to judge of the reasonableness of the assignment. It is not without benefit to the tenant that the moss-lands should be thus assigned, rather than that he should have a general liberty; because it is a convenience to him to have a portion assigned which will be near his house, and at hand for his occasions.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice, compared the pleas and replication, to show that it might be intended that the ancient messuages—to which, as well as to the messuage of the defendants, this custom was stated to apply—were all the ancient messuages: He said, that perhaps reasonable proportions might in this case imply that sufficient was to be left, but that it was not necessary to determine that point, because in this case sufficient had been left: he added, that *reasonable* may take in *all the considerations by which the property [*194] upon which the assignment is exercised is to be determined.

Judgment for the plaintiff.

On Saturday, the 11th of February, 1786, this judgment was unanimously affirmed in the Court of Exchequer Chamber.¹

In the argument in the King's Bench a question was made, whether the plaintiff ought not to have traversed, in his replication, the general right claimed by the defendants in their plea, because otherwise the answer is only argumentative; and when a qualification is set up, the general right ought to be traversed. This was argued at the bar, but the Court said nothing of it, it being an objection of form only, to be taken advantage of by demurrer, and not available after verdict. See *Kenchin v. Knight*, B. R., T. 22 & 23 G. 3, 1 Wils. 253, and *Arlett v. Ellis*, *ubi sup.*

¹ See *Arlett v. Ellis*, B. R., T. 8 G. 4, 7 B. & C. 346, and the observations there on the principal case, p. 367.

ROBERTS, *qui tam*, v. IRVINE. Nov. 28.

In an action of debt for a penalty under 2 Geo. 3, c. 20, s. 16, for acting as a major of militia without being duly qualified, it is sufficient to aver that the defendant acted as such major, "not being in any manner qualified by the laws and statutes of the realm."

THIS was an action of debt, brought as well for the clerk of the regiment of militia, &c., for the common stock of the said militia, as for the plaintiff. The declaration stated that, after the 2 Geo. 3, c. 20, s. 16, and 9 Geo. 3, the said defendant did execute one of the powers conferred by the

said acts of parliament on majors of militia, not being in any manner qualified by the laws and statutes of the realm, &c., whereby an action did accrue to the said clerk of the said militia, &c., and to the plaintiff, &c. Plea, not guilty. A verdict having been found for the plaintiff, a rule was obtained by *Boxer* to show cause why the judgment should not be arrested.

Wallace, A. G., and *Rous*, showed cause.—The objection is, that the declaration does not show on what disqualification the jury found their verdict, for that it only states that the defendant exercised the powers of a major of militia, not *being qualified by the laws and statutes of the realm in [*195] any manner so to do. This objection cannot be maintained. The allegation in the declaration, that the defendant was not in any manner qualified, negatives every qualification, and puts the defendant to show any qualification he may have to exempt him from the penalty. It resembles a declaration on the game laws, where the allegation is the same as here. Besides, after verdict, every intendment shall be made to support the declaration in penal as well as in other actions. *Saint John v. Saint John*, Hob. 78; *Frederick v. Lookup*, B. R., H. 7 G. 3, 4 Burr. 2018.

Mansfield and *Bower*, contra.—The declaration does not contain sufficient certainty, for it does not show that the defendant was disqualified by want of estate, which is the only disqualification that can subject him to the penalty here claimed. Nor is this defect aided by the verdict, for the Court, after verdict, will only intend that those facts were proved at the trial, without the proof of which the plaintiff could not recover. But here the proving that the defendant is any way disqualified proves the declaration; yet every disqualification, of which there are many, does not subject him to the penalty. Upon a general declaration like this, the party cannot tell that the want of estate is the charge intended against him, and therefore might not be prepared to meet it. The form of declaring on the game laws, will not warrant this, because, in an action on the game laws, every disqualification has the same effect, and subjects the party to the same penalty. Had the declaration set out negatively all the disqualifications, it would have appeared whether this was amongst them.

LORD MANSFIELD.—There was no surprise here, for the action is brought by the clerk of the regiment under a particular statute, and the defendant ought in his defence to have shown himself qualified under that statute.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—The words “not being in any manner qualified,” do not alter the case, and would not assist the declaration if it were otherwise imperfect. The charge is, that the defendant has acted not being qualified; and he must come prepared to prove at the trial that he is qualified in every [*196] particular. It would not have been better for him *if the plaintiff had set out every disqualification, for he must still have come prepared to prove himself qualified.¹

Rule discharged.

¹ In Mr. Wilson's note of this case there is the following passage:—“But they held that the plaintiff, having claimed a penalty under particular statutes, could not recover without proving the defendant disqualified under those statutes; and on the same account the defendant was apprised that it would be incumbent on him to prove himself qualified under these acts.” In two other reports of the same case there is nothing said of the Court having held it incumbent on the plaintiff to prove the disqualification, and Mr. Wilson was therefore probably mistaken. If it lay upon the plaintiff to prove the disqualification, it could hardly be said to be incumbent on the defendant to prove himself qualified. In actions upon the game laws, the *onus probandi* does not lie upon the plaintiff, but upon the defendant, since it is a fact peculiarly within his own knowledge. See *Spieries v. Parker*, B. R., H. 26 G. 3, 1 T. B. 144; *The King v. Stone*, B. R., T. 41 G. 3, 1 East, 651; *Jelfs v. Ballard*, C. B., T. 89 G. 3, 1 Bos. & Pul. 468.

C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Hilary Term,

IN THE TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.

The KING *v.* the Inhabitants of WOODSFORD. *Jan.* 24, 1783.

(Reported, CALDWELL, 226.)

RINGSTED and Another *v.* JANE BUTLER, widow; Dowager Countess
of LANESBOROUGH in Ireland.¹ *Jan.* 24.

The wife of a person who resides in Ireland, herself living in England, and having a separate maintenance under articles of separation, may be sued after the death of her husband for a debt contracted by her in England during his lifetime.

THIS was an action of assumpsit, and the defendant pleaded, 1. The general issue; 2. The statute of limitation; and 3. That at that time, &c., she was covert with Brinsley Butler, Earl of Lanesborough, in the kingdom of Ireland, then her husband in his lifetime, who is since deceased. To the 3d plea, the plaintiffs replied, that the said Jane and the said Brinsley Butler, long before, &c., viz., on the 1st of January, 1774, were parted and separated, and lived apart and separate from each other, and always from thence, and until the time of the death of the said Brinsley Butler, continued to live separate and apart from each other; to wit, the said Brinsley Butler in the kingdom of Ireland, and the said Jane in England; and the said Jane during all that time, by a certain deed of separation *and maintenance, for that purpose made and provided, had a large main- [*198] tenance allowed and duly paid to her, from the said Brinsley Butler, for her support and maintenance. To this replication the defendant demurred specially, and assigned for cause that the plaintiffs have not set forth the date of, or parties to, or the substance of, the deed of separation and maintenance in the said replication mentioned, nor the amount of such pretended maintenance, nor where payable, nor have brought into Court the said deed, or any counterpart thereof; and that the said replication offers to put in issue matter foreign to the matter of bar pleaded by the defendant. The case was argued in Michaelmas Term by *Morgan* for the defendant, and by *Lawrence* for the plaintiffs.

¹ S. C. Co. B. L. 2d ed. 82.

Morgan, for the defendant.—A *feme covert* cannot contract during coverture, unless in the case of the abjuration of the realm, or the exile of her husband, Co. Litt. 132 b, 133 a, or by the custom of the city of London, by which a *feme covert* trading there may make herself liable; but this exception confirms the general rule. In no other case can a *feme covert* make herself liable. *Lane v. Schutz*, C. B., E. 18 Geo. 3, 2 Black. 1195; *Hatchett v. Baddeley*, C. B., E. 16 Geo. 3, 2 Black. 1079. [Lord MANSFIELD said, that in a case at Maidstone, where the husband had been transported, he had held the woman liable, and that Mr. Justice YATES had done the same at Carlisle.¹]

Lawrence, contra.—If the defendant is not liable, no one else can be charged, for she was living separate from her husband, who was in Ireland, and certainly no credit was given to him. The cases cited on the other side may be distinguished. *Hatchett v. Baddeley* went on the ground of elopement not being a word known to the Court. DE GREY, Chief Justice, distinguished it from the case of a woman separated from her husband and having a separate maintenance: in that case also it was objected, that the husband had not been joined for conformity; but here the defendant is a widow. So also in *Lane v. Schutz* it does not appear that the Court agreed on the general question. A *feme covert* cannot contract, on account of the union between her and her husband. She has no property, she has *no will [*199] of her own. The exceptions to the general rule are cases in which the union has been dissolved; nor is it material by what means that dissolution has taken effect. It need not be founded on the crime of the husband. Profession is no crime; and the Duchess of Mazarine's case, B. R., H. 8 W. 3, 1 Salk. 116; 2 Salk. 646; 1 Ld. Raym. 147, S. C., did not proceed on the ground of crime. Here the dominion of her husband has ceased, for the Court will not permit a husband to reclaim his wife, living apart from him under articles of separation. *R. v. Mead*, B. R., E. 31 G. 2, 1 Burr. 542. It is not necessary to argue that the wife can contract so as to bind her husband, or her husband's property; it is sufficient to show that she has the capacity of binding her own separate property. It is by no means universally true that a *feme covert* cannot contract. In Chancery she may contract, so as to bind her separate property. *Dubois v. Hole*, 2 Vern. 614. So may a *feme covert* trader in London. There are also some cases in which, where the wife has been the meritorious cause, she may be sued after her husband's death, though not in his lifetime.

Morgan, in reply.—In settlements on separation there is always a security to protect the husband from the wife's debts. The Court will not permit a husband to reclaim his wife after separation, because it is against his own agreement. The case of the Duchess of Mazarine is in favor of the defendant, for the jury is there said to have determined against law.²

Lord MANSFIELD.—The cases in the Common Pleas show that the Judges of that court regarded the general question as one of great importance, and in both of those cases the judgment of the Court proceeded on partial grounds. It is certainly a considerable question; for within the last century a great change has been introduced into the law relating to married persons, by means of trusts; and there is also a system of cases for the protection of the husband against the debts of the wife. It is settled, that a woman eloping, or living in adultery, shall not charge her *husband [*200] if the creditor was acquainted with her situation; but in the mere

¹ *Sparrow v. Carruthers*, cited 1 W. Bl. 1197, 1 T. R. 6; and see 2 B. & P. 238, 1 B. & P. 359.

² This is taken from the marginal abstract in 2 Salk. 646, where it is said that a new trial was not granted for mistake, in point of law, against the honesty and equity of the cause. See also 2 Wils. 808.

case of a woman living separate, the creditor stands in her place as to necessities, and if she is entitled he is. There is also a third class of cases—where the woman lives separate, and has a maintenance, and the creditor knows of it; in which case he shall not charge the husband. Here it was notorious that Lady Lanesborough was separated; she resided in England, while her husband remained in Ireland. To hold a woman liable under such circumstances is justice to the creditor and mercy to the woman herself, for it enables her to obtain credit. But it is a question of consequence, and I should be glad to have it argued again.

The case, therefore, stood over for further argument until the present term, when it was argued by *Wallace* for the defendant, and *Davenport* for the plaintiffs.

Wallace, for the defendant.—The general question is, whether a woman in the situation of the defendant is liable to engagements of all sorts as a *feme sole*. Coverture is at least a general answer to the demand. *Manby v. Scott*, Exc. Ch. E. 15 Car. 2, 1 Sid. 109; 1 Lev. 5, S. C. The Judges there differed on other points; but upon this they all agreed, that a *feme covert* cannot bind herself. The question will be if the present case be an exception, for that there are exceptions must be admitted. Thus the civil death of the husband, as by profession, exile (by act of parliament), or abjuring the realm, will render the wife capable of contracting. Co. Litt. 132, 133. But it is said in the same place, that where the husband is only banished for a time, she is not capable. In the former cases, indeed, she had her dower. From that time until the late decisions in the Common Pleas, there has been no case on the subject. The case of *Hatchett v. Baddeley* went entirely on the elopement, and no point was made on separate maintenance. That question came on in *Lean v. Schutz*. The replication in the present case is copied from that in *Lean v. Schutz*, except that it does not lay the debt to be for necessities, or things suitable to the wife's condition. That case does not prove anything as to the general point, except that one judge differed. Under the custom of London, the surplus of a *feme trader's* estate is the husband's. That is the reason of the husband being joined, in order that he may see that the estate is taken care of. A sole trader is liable *only to debts in trade. Here, at the utmost, the separate maintenance only is to be applied to the finding of maintenance. Yet, [*201] under the pleadings, it must be argued that the wife is liable to engagements to any extent, while, at the same time, she is incapable of acquiring property; for if there is a gift or bequest to her during separation, the husband will take. That the union between the husband and wife continues, appears from the fact, that if he purchases lands during the separation, she is entitled to dower. In equity the separate estate is only made answerable by the intervention of trustees; and the decree is always against the trustees, and not against the wife. In one case, where after the death of the husband the wife became entitled to her jointure, an application was made to subject the jointure to her debts, which the Lord Chancellor refused to do because the separate maintenance was gone.

Davenport, contra.—There are a great many distinct relations between the husband, and wife, and creditors, under different circumstances, though it is true that none of the cases go directly to the present question. With regard to the right of the creditor against the husband, there are two cases in which the latter is not liable. 1. In case of adultery. While the wife lives in adultery she cannot have any relief, either in equity or in the spiritual court, and the husband is not liable to her debts. 2. Where the wife has a separate maintenance, of which the creditor has notice, the husband is not liable. It remains to consider what right the creditor has in those cases

against the wife herself. The reasons why the wife is not liable are, that she has no will of her own, that she has no property of her own, and because otherwise a separation might be effected by collusion. The cases have gone so far, that where a judgment has been obtained against a *feme sole*, the husband may come in and reverse it on error. *Hayward v. Williams*, Up. Bench, T. 1651, Styles, 280. With regard to the criminal liability of a *feme covert*, she is answerable for crimes committed without the intervention of her husband, being then considered a sole agent; and in treason, and some other crimes, she is answerable, though they be committed by her jointly with her husband. Hale, P. C. 44, 45, 46. So there are some acts [*202] of a civil nature done by a wife, which, if not *avoided by her husband, will bind her. Thus she may levy a fine alone; which will bind her, though not her husband. Br. Ab. Fine of Lands, pl. 83. The cases of abjuration, profession, and exile, put by Lord COKE, proceed upon no other ground than that of necessity and convenience. There are other authorities to the same effect. In Br. Ab. Baron & Feme, pl. 66, it is said that the wife of a man exiled may sue in trespass alone. The case of *Lady Maltravers*, Co. Litt. 132, is to the same effect. The decision at Maidstone, where the wife of a man transported, being a baker, was allowed to be sued alone, proceeded on the same ground of necessity. The woman had a right to labor, and to make her earnings available for her creditors. If she had had a separate maintenance, the reasoning and the decision must have been the same. The argument urged on the other side, as to the right of dower out of the purchased lands, and the right of the husband to a bequest made to the wife, would apply in the case of a man who has been transported. It is true that the marital rights are not done away, yet that will not of necessity prevent the wife from becoming civilly liable. There are cases in which the spiritual courts and courts of equity have gone all the length now contended for, and this court has refused to grant a prohibition. *Chamberlain v. Hewson*, B. R., H. 7 W. 3, 1 Salk. 115. The whole of the law which prohibits the husband from being made liable, or the wife from being charged separately, was introduced for the benefit of the husband: but here he has renounced the society of his wife by deed; he cannot reclaim her; he has given her a separate property; he has abandoned the whole benefit of his marital rights. There is no clear decision against the plaintiffs, and all the arguments of reason and of convenience are in their favor.

Wallace having been heard in reply,

Lord MANSFIELD delivered the opinion of the Court.—This is an action by a tradesman for goods sold to, and work and labor done for, the defendant. [His Lordship then stated the pleadings.] I state the pleadings, because the opinion we give will turn on all the circumstances of the case taken together; and what I say will only apply to a case situated exactly [*203] like the present. It has been truly *stated that by the common law the wife has no separate power of contracting. She has no property of her own; her personal estate absolutely, and her real estate during coverture, are her husband's; she, therefore, cannot contract, but he is bound to support her. General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law. The earlier cases, in the reigns of Henry the Fourth and Edward the Third, arose on the exile or abjuration of the husband. Lord COKE calls it a civil death, but it is not so. It does not dissolve the marriage bond, and it only resembles a civil death in conferring upon the wife a capacity to sue. In the reign of Henry the Sixth, another authority is found where the wife was allowed to maintain trespass. In the time of William the Third, the Duchess

of Mazarine's case occurred; and there HOLT, C. J. (Lord Raym. 147; see Compton v. Collinson, C. B., H. 30 G. 3, 1 H. Bl. 349), said, that it did not differ from the case of the exile of the husband. Lastly comes the case before YATES, J., at Carlisle (I do not mention that before myself). He considered transportation within the reason of exile, although Lord COKE, confining himself to the letter, says that the exile must be for life. Can it indeed be held that a woman whose husband is transported or abroad cannot go into service and sue for her wages?

The question now is, Can the defendant avail herself of the plea of coverture against the plaintiffs' demand, or shall she be considered a *feme sole* when the debt was contracted? It is averred in the replication that the husband resided in Ireland; but it is not averred (as the fact was) that his estate was in Ireland, so I lay that out of the case. The agreement of separation bound both the parties in the same manner as if they had been sole, and the Court will not suffer either of them to break through it. Under this agreement the wife possesses a separate property. She is no longer under the control of her husband, and creditors even for necessities have no remedy against him. Credit was given to her as a single woman; and shall she now be permitted to say that she was not single? A case occurred before me at Guildhall of an action against a woman upon *a bond. On *non est factum* pleaded, she attempted to set up the defence of coverture, but I would not allow it, for she had represented herself as a single woman, and executed the bond as such, and it did not lie in her mouth to say that she was married. [*204]

Upon the present question there is no case precisely in point; we must therefore make a precedent from reason and analogy. Two cases have been mentioned, decided in the Court of Common Pleas. In Hatchett v. Baddeley the wife had no separate maintenance; and it did not follow, from the word "elopement," that she lived in adultery. In the other case the Court was divided on the merits, and it appears that one judge did not coincide with the rest of the court. The ground on which that case was decided does not occur here; but I am inclined to say, that if Lord Lanesborough were now alive, and in Ireland, he need not be joined. This does not resemble the case of the *feme sole* trader in London, for there the husband is interested both in her person and in her stock in trade. The present bears a greater resemblance to the case of exile; than which, indeed, it is stronger. There, as here, the marriage is not dissolved: it subsists for every other purpose than that of the wife suing and being sued. As in the case of exile or abjuration, Lord Lanesborough was out of the kingdom, and not amenable to the process of our courts. We are of opinion that the case resembles abjuration or exile in every particular, that the wife therefore may be sued alone, and that she cannot avail herself of this most iniquitous defence.

Judgment for the plaintiffs.¹

¹ Although this case came under the consideration of the Court of King's Bench, in Marshall v. Rutton, 8 T. R. 554, by which it is generally supposed to have been overruled, yet that consequence does not appear necessarily to follow; for in Marshall v. Rutton there was no averment that the husband resided out of the jurisdiction of the English courts, as in the principal case. In the cases of Barwell v. Brooks, B. R., H. 24 G. 3, post, and Corbett v. Poelnitz, B. R., M. 26 G. 3, 1 T. R. 5, the Court indeed held that the circumstance of the husband residing in this country made no difference.

The cases respecting the separate liability of a married woman may be classed under the following heads: 1. Where she is merely living separate; 2. Where she is living separate by consent, and with a separate allowance; 3. Where she is living separate, her husband being abroad; 4. Where she *is living separate, her husband being a foreigner, and resident abroad; 5. Where she is living [*205] separate, her husband being banished or transported; 6. Where she is living separate in adultery; 7. Where she has been divorced.

1. Where the wife is merely living separate, whether with or without the consent of her husband, it is clear that she cannot make herself liable to be sued as a *feme sole*; a position recognised in all the cases.

2. Where the wife lives separate by consent, and enjoys a separate allowance, it is now settled that she cannot render herself personally liable. *Marshall v. Rutton, ubi supra*. To this law there is, according to the principal case, an exception when the husband is residing out of the jurisdiction of the English courts.

3. Where the wife is living separate from her husband, who resides abroad, she cannot render herself liable by her own contracts, although the residence abroad of her husband be permanent. *Marsh v. Hutchinson*, C. B., T. 40 G. 3, 2 B. & P. 226; *Farrar v. Lady Granard*, C. B., T. 44 G. 3, 2 Bos. & Pul. N. R. 80. Nor can she in such case maintain an action as a *feme sole*. *Boggett v. Frier*, B. R., T. 49 G. 3, 11 East, 301.

4. Where the wife is living separate from her husband, who is a foreigner, residing abroad, the decisions differ as to her liability. In the *Duchess of Mazarine's* case, B. R., H. 8 & 9 W. 3, 1 Lord Raym. 147, it was held, that the Duchess, who had resided here twenty years, and whose husband was an alien enemy resident in France, was liable on her own contracts. *HOLT*, C. J., said, "Where the husband is an alien enemy, and under an absolute disability to come and live here, the law perhaps will make the wife of such a husband chargeable as a *feme sole* for her debts and contracts." So in *Walford v. Duchess of Pienne*, 2 Esp. N. P. C. 564; where it appeared that the husband and wife, being foreigners, had come to this country, and that four years before the trial the husband had gone abroad, where he remained, Lord KENYON said that the case came within the principle of the old common law, where the husband had abjured the realm; that if the husband had been absent for some time, and then returned, and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the wife not liable; but here was a desertion of the kingdom, and an absence of some years: he was no longer domiciled here, and in the interval his wife had been supplied with the articles; and if she was not held liable for debts contracted under such circumstances, she might be starved. In the same year another action was brought against the same defendant, and Lord KENYON ruled the same way. *Franks v. Duchess of Pienne*, 2 Esp. N. P. C. 587. The Court of Common Pleas established the same doctrine in the case of *De Gaillon v. L'Aigle*, M. 89 G. 3, 1 B. & P. 8 & 857, *HEATH*, J., observing, "The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the *feme covert* that she should be liable to an action in

such a case as this; otherwise she could obtain no credit, and would have *no [*206] means of gaining her livelihood. The husband perhaps never was in England, and never may be; so that this case is not at all like those which proceeded on the ground of a separate maintenance." In *Kay v. Duchess of Pienne*, 3 Camp. N. P. C. 123, however, Lord ELLENBOROUGH expressed himself dissatisfied with these opinions. There the Duke and Duchess of Pienne had lived in England as man and wife till 1803, when the Duke went abroad and entered in the service of Sweden, where he remained. Lord ELLENBOROUGH said, "If the husband has never been in this kingdom, the wife of an alien, I think, may be sued as a *feme sole*. This is the *Duchess of Mazarine's* case. I don't know whether it was distinctly brought to Lord KENYON's attention, that the Duke de Pienne had been living with the defendant as his wife within this realm. If so, I cannot subscribe to his opinion. But, at the time of those decisions, *Ringsted v. Lady Lanesborough*, and *Corbett v. Poelnitz*, had not been judicially overturned. Since the case of *Marshall v. Rutton*, which restored the old common law on this subject, I consider it quite clear that a married woman, under the circumstances of the present defendant, is not liable to be sued as a *feme sole*. When the husband has abjured the realm, or been exiled, he cannot return, and the case stands upon perfectly different principles."

5. Where a married woman is living separate from her husband, who has been banished or transported, she is liable to be sued as a *feme sole* until the actual return of her husband. Abjuration or exile is a civil death. Co. Litt. 138, a, *Wilmot's* case, Moor, 861. Thus, where the husband of Lady Sandys was banished, during life, by act of parliament, the court were of opinion that she might in all things act as a *feme sole*, as if her husband were dead; that the necessity of the case required she should have such power, and that a will made by her was good. Countess of *Portland v. Prodggers*, Canc. 1889, 2 Vern. 204. See also *Newsome v. Bowyer*, Canc. 1729, 3 P. Williams, 37. This law was extended to the case of transportation by the two decisions of Lord MANSFIELD and Mr. Justice YATES mentioned in the text; and Lord ALVANLEY ruled, that though the period of the husband's transportation had expired, yet if in fact he had not returned, his wife might sue as a *feme sole*. *Car-*

roll v. Blencow, 4 Esp. N. P. C. 27. This point is adverted to by Lord ELDON, C. J., in *Marsh v. Hutchinson*, 2 B. & P. 282, and appears to have been considered by him as a question of much doubt.

6. Where the wife lives separate from her husband, and in adultery, she cannot be sued as a *feme sole*. *Gilchrist v. Brown*, B. R., T. 82 G. 8, 4 T. R. 766. See also *Hatchett v. Baddeley*, C. B., E. 16 G. 8, 2 W. Bl. 1079.

7. Where a woman has been divorced merely *a mens et thoro*, the relation of marriage still subsists, and she is liable to be sued as a *feme sole*. *Lewis v. Lee*, B. R., T. 6 G. 4, 2 B. & C. 291; but it is otherwise where she is divorced *a vinculo matrimonii*.

Where the wife is the party really interested, and has a separate maintenance, the proper *course for her is to sue in her husband's name; and the Court will not stay the proceedings on the application of the defendant, and will [*207] set aside a plea of release by the husband. *Chambers v. Donaldson*, B. R., E. 48 G. 8, 9 East, 471; *Innell v. Newman*, B. R., E. 2 G. 4, 4 B. & A. 419.

The KING v. TUNWELL, Mayor of Cambridge.¹ Jan. 31.

A corporation cannot by a by-law narrow the number of persons eligible to corporate officers.

A RULE had been obtained, by *Partridge*, to show cause why an information, in the nature of a *quo warranto*, should not be exhibited against the defendant, to show by what authority he claimed to be Mayor of Cambridge. It appeared by the affidavits, that, by a charter of James I., the borough was incorporated by the name of the mayor, bailiff, and burgesses of Cambridge, and the mayor to be elected out of the burgesses. This charter was confirmed by Charles I. The custom in the borough had been always to elect the mayor out of the aldermen, of whom there are twelve besides the mayor.

In 1699 a by-law was made, whereby it was declared, that, for the future, no alderman should be eligible into the office of mayor who had served that office within six years next before the election; and a penalty was imposed on the persons electing him mayor within that time, and on him for accepting the office. This by-law had been acquiesced in from the time of the making of it till the month of August, 1782, when Tunwell was elected mayor, and entered on his office, although he had been mayor before within six years, viz. : in 1778. It was therefore said, that on the by-law of 1699 he was not eligible, and this rule for an information was applied for.

Wallace and *Wilson*, against the rule, contended that the by-law was clearly bad, as restraining the number of persons out of whom the election was to be made as appointed by the charter, which a by-law could not do, although it might narrow the number of Electors for the sake of avoiding popular confusion. *Case of Corporations*, M. 40 & 41 Eliz., 4 Co. 78. This by-law narrowed the number of persons out of whom the election was to be made, for out of twelve it excluded six; and it was therefore expressly within the rule laid down in *R. v. *Phillips*, Mayor of Carmarthon, B. R., T. 22 G. 2, cited 3 Burr. 1833; B. N. P. 211; Selw. N. P. 1083, 4th ed. S. C.; [*208] *Lee v. Wallis*, B. R., H. 29 G. 2, cited 3 Burr. 1833; 1 Kenyon, 292; *Sayer*, 263, S. C.; and *R. v. Spencer*, B. R., H. 6 G. 8, 3 Burr. 1827. If the point were doubtful, the Court would not decide it in this stage; but as it is completely settled, the rule must be discharged.

Bearcroft, *Partridge*, *Graham*, and *Le Blanc*, contra.—The corporation have for eighty years submitted to this by-law, which is in itself a sufficient ground against a decision in this stage of the question. According to the *Case of Corporations*, the number of electors may be narrowed; and that decision goes the whole length of this case. There is no distinction, in prin-

¹ S. C. cited 2 Selw. N. P. 1083, 4th ed.

ciple, between the narrowing the number of the electors and of the eligible. The restraint is only *sub modo*, and for a time; in which respect this case differs from those which have been cited. In *R. v. Phillips* the by-law removed for ever from the office of mayor all the common burgesses who were eligible by the charter; and in *Lee v. Wallis* the election was restrained to eight persons nominated by the warden. Here no permanent incapacity was inflicted on anybody. The by-law is neither against public policy nor contrary to the charter, which only says that a burgess shall be elected. They cited *Butler v. Palmer*, B. R., T. 11 Will. 3, 1 Salk. 190, and *London City v. Vanacher*, B. R., E. 11 Will. 3, Carth. 480.

Lord MANSFIELD.—Where there is any question of law or fact in dispute, the Court will grant an information to put it in a more solemn form of determination; but where the Court see no doubt, especially in point of fact, they should not send it to trial. Here there is no doubt either as to the law or as to the fact. The law is plain, that a corporation cannot give themselves a new constitution. In the Case of Corporations much might have been said as to the giving a new constitution; but that case was determined on sound policy, to avoid popular confusion, and care has been taken ever since to prevent that case from being carried further. The law is clearly settled in *R. v. Phillips* and *Lee v. Wallis*, which have been considered in subsequent cases. The decision in *Salkeld* is quite different.

[*209] ASHURST, Justice.—The question is the same as if the *by-laws had been made yesterday. The case of *R. v. Phillips* is decisive.

BULLER, Justice.—There is no distinction between this case and that of *R. v. Spencer*. *R. v. Phillips* was argued several times, and settled the point, that the number of the eligible cannot be narrowed, although, according to the case in *COKE*, it is otherwise with regard to the number of the electors.

Rule discharged.¹

¹ See *The King v. Tappenden*, B. R., M. 43 G. 8, 8 East, 186.

ROE, on the demise of DAVIS, v. KENT and Another. Jan. 31.

A. S. being in wrongful possession of certain estates, devised them to his two nephews, whom he appointed executors. The nephews received the rent due in the testator's time, and afterwards levied a fine of the estates. After the levying of the fine, they received the rents accruing in their own time. Held, WILLES, J., *dubitante*, that it was rightly left to the jury to say whether the nephews had a sufficient wrongful possession to support the fine; and the jury having found it sufficient, the Court refused to interfere.

THIS was an action of ejectment, on the trial of which it appeared in evidence that Oliver Silverthorpe the elder, in his lifetime, was in wrongful possession of the estates for which the ejectment was brought, and which belonged to his son Oliver Silverthorpe the younger. That after receiving the rents and profits of the estates he died, on the 15th of January, 1770, and devised the estates to his two nephews, whom he also appointed executors of his will. That on the 31st of January, 1770, the devisees received the rent which had accrued due in the time of the testator, for which they gave receipts. That in Trinity Term, 1770, the devisees levied a fine of the estates; and that in December, 1770, they received the rents of the estates on their own account. The lessor of the plaintiff was the heir-at-law of Oliver Silverthorpe the son; and the question was, whether the receipt of rent by the devisees was, under the circumstances, a sufficient wrongful possession to support the fine. The jury were of opinion that it was sufficient, and found

a verdict for the defendant. A rule *Nisi* having been obtained for a new trial,

Bearcroft and *Bower* showed cause.—The objection is, that, as the first receipt of rent in January was, *eo nomine*, received by the devisees in their capacity of executors, and that as the next receipt, in December, was after the levying of the fine, there was nothing to show that the devisees, at the time of the fine levied, were in possession. The answer is, that the possession of the tenant was the possession of *the devisees. The same person continued tenant who was tenant of Oliver Silverthorpe the [*210] father, who was a disseisor; and he continued to be the tenant of those who claimed under him. Co. Litt. 287. The receipt of rent is only evidence that the tenant of the land holds under another. Here the second receipt of rent, though subsequent to the fine, is evidence that the devisees assented to the devise, and affirms their title under the will from the death of the testator. If this fine is not good, no fine can be so unless the conusor is in the manual occupation of the land.

Wallace, A. G., and *Haworth*, contra.—Silverthorpe the father took possession of his son's estate, and continued in possession till his death, when he devised it from his son to his two nephews, whom he made his executors. At his death a year's rent was due from the Michaelmas preceding, which could only be received by the devisees in their character of executors. This, then, was no possession. Afterwards, in Trinity term, without any attornment on the part of the tenants, they levied a fine. It is clear, that without possession that fine will not operate as a bar by way of non-claim. *Atkins v. Horde*, B. R., H. 30 G. 2, 1 Burr. 60. At the Michaelmas following the devisees received the rent accruing in their own time; but the fine must be complete when it is levied, and the rights of other parties divested then, or not at all. It cannot depend on any after-act of the tenant whether the fine shall be good or not; nor will the Court make an act relate back unless to perfect a rightful title. Such a fine may, it is true, operate as a conveyance, and bind the parties and their privies, *Shep. Touch. 23*, but it can have no effect as a bar by way of non-claim.

LORD MANSFIELD.—It was left as a matter of fact to the jury, whether there was not evidence of an agreement after the death of the testator, between the devisees and the tenant, that the latter should become tenant to the former. The parties met soon after the death of the testator, and at the end of the year the tenant paid the rent. This was evidence from which the tenant might presume such an agreement.

WILLES, Justice.—I doubt whether the possession was altogether a matter of fact, and to be left to the jury. I incline to think that it was matter of fact mixed with matter of *law, and that it should have been so stated [*211] to the jury by the Court. The payment in January only admitted a tenancy to the disseisor, and not to the executors; and to make the second payment relate back is a fiction.

ASHURST, Justice.—This seems to me to be matter of fact proper to be left to the jury; and the jury have found that the payment of rent at Michaelmas, 1770, was an acknowledgment that the tenant held during the preceding year.

BULLER, Justice.—I think the fine was a bar on two grounds: first, the freehold was in the devisees before entry, Co. Litt. 35, 36, 111 a; and if the actual freehold was in him the fine was well levied. If the freehold were not in the devisee before entry, there would be great inconvenience. Leases are sometimes made without any reservation of rent for several years: must the devisee then institute a suit to compel attornment? But, secondly, I think there was evidence to show an agreement on the part of the tenant to

become tenant to the devisees. Whether the possession was sufficient is a question of law, what was the possession is a question of fact. The payment at Michaelmas is a strong piece of evidence to show that the tenant was all the time tenant to the devisees. As to the relation, there is a strong *dictum* in Leonard, 3 Leon. 227.

Rule discharged.

MORTON v. FENN. Feb. 1.

Action for breach of promise of marriage. It appeared that the first promise was made by the defendant in consideration that the plaintiff would go to bed with him, which she did; but there was evidence of subsequent promises. *Semble*, that this is not such a *turpis contractus* as to prevent the plaintiff from recovering.

THIS was an action for breach of promise of marriage, tried before Lord MANSFIELD. The evidence was, that the defendant, who was a man of fortune, in Jamaica, aged seventy, promised to marry the plaintiff, 'a widow of fifty-three, if she would go to bed to him that night, which she did, and lived afterwards with him a considerable time. It appeared also that the defendant several times afterwards repeated his resolution to marry her, but that he afterwards married another woman. The jury found a verdict for the plaintiff with £2000 damages. A rule *Nisi* for a new trial having been obtained, on [212] the ground that it was *turpis contractus*, being on condition of the plaintiff going to bed with the defendant, Lord MANSFIELD said, I thought the objection would not lie on two grounds: 1. That before the marriage-act this would have been a good marriage, and the children legitimate by the rules of the common law; 2. I thought so because the parties were not in *pari delicto*, but this was a cheat on the part of the man.

ERKINE now showed cause.—The Court will pause before they determine that an action cannot be maintained where there has been a seduction. It is absurd, that where the defendant has been guilty of no crime he shall be liable to an action, but that where he has been guilty of the grossest seduction he shall go free. In the present case, moreover, there were subsequent promises made in consideration of the defendant's good opinion of the plaintiff, which are not affected by the consideration of the first promise, even supposing that to be base. There are many cases in equity where prior cohabitation has been held not to vacate the security. As to the damages being excessive, the principle upon which a new trial is granted upon that ground is, that, in pecuniary contracts, the Court will see that the jury do not go beyond the clear meaning of the parties; but that in actions for torts, to which there is no measure affixed by law, the jury have the sole province of estimating the damages. He cited *Turner v. Vaughan*, C. B., E. 7 G. 3, 3 Wils. 339, and the case referred to there by BATHURST, J.

Wallace and Baldwin, contra.—No case has been, or can be, mentioned, in which any court, ecclesiastical or other, has held a marriage good founded only on a promise like the present. Since the marriage-act this is no longer a marriage, nor capable of being enforced, but is simply fornication. The cases in equity mentioned on the other side are on securities given, and the party comes to pray relief against his own security—a very different question from the present. This is not like the case where, after a promise of marriage, a man succeeds in seducing a woman: it is here a condition. What are called the subsequent promises occurred only in conversations with third persons, and not in the presence of the plaintiff. As to the enormity of the

¹See the popular report of his speech. "Speeches of Lord Erskine, when at the Bar, on Miscellaneous Subjects," p. 81.

*damages, they are such as to argue a partiality in the jury, and an improper influence. There is therefore ground for sending back the case to be reconsidered. [*213]

The Court took time to consider, and in the meanwhile recommended the parties to agree that the defendant should pay the plaintiff £500; and, on a subsequent day *Wallace* informed the Court that the parties had consented to that arrangement.

CARRICK v. VICKERY. Feb. 1.

(Reported ante, vol. ii. p. 653, n.)

HIDE v. BRUCE. Feb. 1.

Warranty that a ship had twenty guns. It is no breach of the warranty, that she had only twenty-five men, and that it required sixty men to man twenty guns.

THIS was an action upon a policy of insurance on goods, lost or not lost, at and from Leghorn to Gibraltar. There was a warranty in the policy that the ship had twenty guns. It appeared in evidence that she had twenty guns, but only twenty-five men, and that it required sixty men to man twenty guns. It was contended for the defendant that the warranty implied that there should be a proportionable number of men. A verdict was given for the plaintiff; and a rule having been obtained for a new trial,

Wallace, A. G., and *Lee*, showed cause.—There is no implied warranty as to men, nor could it be so intended, for the ship was in a foreign port, and the captain could not get as many men as he pleased. The construction contended for on the other side would make a warranty extend to implications.

Couper, contra.—This was a warranty that the ship was a ship of the force of twenty guns. Was she a ship of that force? It is not necessary to contend that this was a warranty of guns, and also a warranty of men; but it was a warranty of the number of guns, and a representation that she had a reasonable quantity of men in proportion to the guns. For the purposes of fighting, twenty-five men were quite useless, for seventeen or eighteen would be necessary to work the ship while in action. Yet in consequence of *this warranty of force, she is permitted to chase and go into danger, to take prizes, and to weaken herself still further. There has therefore been a misrepresentation, by which the policy is avoided. [*214]

Lord MANSFIELD.—A warranty makes a contingency, without which the contract is void. But a representation, if true, is not to have the same effect unless there is fraud.

WILLES, ASHURST, and BULLER, Justices, were of the same opinion.

Rule discharged.

HARCOURT v. KNAPP.¹ Feb. 3.

In an action on the game laws for several penalties, the defendant may pay one penalty into court, the plaintiff being at liberty to go on for the others.

ACTION on the game laws for several penalties. *Chambre* moved for a rule to show cause why, on payment by the defendant of one of the penalties

¹ S. C. cited 1 Tidd's Pr. 586, 8th ed.

into court, all proceedings in the action should not be stayed. BULLER, J., said, that the Court would give him leave to pay one penalty into court, but that the plaintiff must be at liberty to go on for the rest. And on *Chambre's* stating that a similar application had been granted in a former case, the Court said that it could only have been by consent.

YEO v. ALLEN.¹ Feb. 5.

Where a bankrupt applies to be discharged out of custody on the ground that he has obtained his certificate, if the plaintiff in the action disputes the trading, the Court will direct an issue to try that fact.

A scrivener is one who lends out money for others for a commission.

THE defendant obtained a rule to show cause why he should not be discharged out of custody on filing common bail, on the ground that he was a bankrupt, and had obtained his certificate.

Wallace showed cause.—The defendant is not a trader subject to the bankrupt laws. He was a receiver-general of the land tax, and as such, by 5 G. 2, c. 30, s. 40, not subject to be made a bankrupt. The plaintiff also disputes the act of bankruptcy and the petitioning creditor's debt. He has [*215] *petitioned the Chancellor to supersede the defendant's commission, but the petition is not yet determined, and he has elected in Chancery to pursue his remedy at law. The plaintiff is willing to try an issue on the trading and the petitioning creditor's debt.

Haworth, contra.—The statute of Geo. 2, only excepts receivers-general as such. The defendant was found to be a trader by receiving the money of others and lending it out, which is acting as a scrivener, and a scrivener is liable to be made a bankrupt. The defendant is entitled to be discharged by the 5 G. 2, c. 30, s. 13, which authorizes the Court, on the bankrupt's producing his certificate allowed and confirmed, to order his discharge; and by s. 7, which makes the certificate evidence of the trading and bankruptcy.

The Court did not give any opinion whether the trading was so connected with the defendant's office of receiver-general as to come within the exception in the statute of Geo. 2, but they were clear that he did not appear to be a money-scrivener; to which it was essential that he should lend out money for others for a commission.

Wallace cited *Willison v. Smith*, B. R., E. 22 G. 3, ante, p. 96, in which the Court had directed an issue.

Lord MANSFIELD.—There is no color on the proceedings for the defendant being a trader. Take an issue in which the only question is to be on the trading; the petitioning creditor's debt and the act of bankruptcy not to be disputed. That must be an admission, and the issue must be in the common form, whether the commission duly issued. And let it be understood, that if there is a verdict for the defendant to the satisfaction of the judge, he shall be discharged next day.

Rule discharged on undertaking accordingly.²

¹ S. C. cited 1 Tidd's Pr. 211, 8th ed.

² See *Woolcot v. Leicester*, C. B., H. 55 G. 3, 6 Taunt. 75; but see also *Harmer v. Ragger*, B. R., H. 58 G. 3, 1 B. & A. 882, where the Court held the certificate evidence of all the previous proceedings.

*HOSKIN v. RIDGWAY.¹ Feb. 5.

[*216]

In an action for a libel published in a newspaper, the Court will not change the venue to the county in which the paper was published.

BALDWIN moved to change the venue from Gloucestershire to Middlesex, in an action for a libel in a newspaper published in Middlesex, on the usual affidavit, that the cause of action arose in Middlesex, and not in Gloucestershire or elsewhere out of Middlesex. The Court said that the newspaper was published in every county in England as well as in Middlesex, where it was printed; and BULLER, Justice, added, that if the party reflected on resided in Gloucestershire, the action would be more properly tried in that county than in Middlesex. Motion denied.²

¹ S. C. cited 1 T. B. 572; 1 Tidd's Pr. 654, 8th ed.

² See Pinkney v. Collins, B. R., H. 27 G. 8, 1 T. R. 571; Cumming v. Naylor, Soacc., H. 8 & 9 G. 4, 2 Y. & J. 110. But where the libel is both written and published in one county only, the Court will change the venue to that county. Freeman v. Norris, B. R., E. 29 G. 8, 8 T. R. 806; Aris v. Taylor, B. R., T. 85 G. 8, 1 Tidd's Pr. 654, 8th ed.; Metcalf v. Markham, B. R., E. 30 G. 8, 8 T. R., 652.

The KING v. The Justices of PETERBOROUGH. Feb. 5.

(Reported, CALDECOTT, 238.)

The KING v. FRANKLYN. Feb. 5.

(Reported, CALDECOTT, 244.)

The KING v. COMPTON et Al. Feb. 5.

(Reported, CALDECOTT, 246.)

The KING v. Inhabitants of SEAGRAVE. Feb. 8.

(Reported, CALDECOTT, 247.)

*The KING v. Inhabitants of SWALCLIFFE. Feb. 8. [*217]

(Reported, CALDECOTT, 248.)

The KING v. ABBOTT. Feb. 12.

(Reported ante, vol. ii. p. 553.)

BUTLER v. GRUBB.¹ Feb. 12.

Where a cause is referred to arbitration, and the costs are to abide the event, the defendant is entitled to them if it appear by the award that the plaintiff's demand is under 40s., which he might have recovered in a court of conscience.

RULE to show cause why the master should not tax the defendant his costs. The cause had been referred, at the trial before Lord MANSFIELD, and the costs were to abide the event. The defendant was within the jurisdiction of the Court of Requests for the borough of Southwark. The arbitrator awarded that there was only £1 17s. due, and stated that no evidence of a set-off was offered.

Peckham showed cause.—This case resembles the case of a judgment by default, where the defendant will not be allowed to make a suggestion on the roll for the purpose of entitling himself to costs. *Brampton v. Crabb*, B. R., H. 3 G. 1, 1 Str. 46.

Haworth, contra.—The costs abiding the event means the legal event of the award; and therefore, where an executor is plaintiff, he is not liable. *Highman v. Hassel*, B. R., H. 15 G. 3, cited 3 T. R. 139. The effect of this award is the same as if the plaintiff, on the trial, had recovered less than 40s.

Per Cur. There is nothing in the case. Let the rule be made absolute. See *Swinglehurst v. Altham*, B. R., H. 29 G. 3, 3 T. R. 138; *Day v. Mears*, B. R., T. 1816, 2 Chitty's R. 156; 2 Tidd, 884, 8th ed.

¹ S. C. cited 2 Tidd's Pr. 884, 8th ed., 3 T. R. 139.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

IN THE TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.¹

MULLINER *v.* WILKES.² May 13.

Action on a promissory note made in favor of one J. M. Plea, the statute of usury. Replication, protesting the corrupt agreement between the defendant and J. M., states that defendant did not, in pursuance of any such corrupt agreement, nor for any such purposes as are in the plea mentioned, make the note, and concluding to the country. Special demurrer, on the ground that the replication should have concluded with a verification, and so held.

THIS action was brought on a promissory note for £290, made by the defendant in favor of John Mabblerley, and endorsed to the plaintiff. The plea was the statute of usury, pleaded as in *Smith v. Dovers*, B. R., T. 20 G. 3, ante, vol. ii. p. 428. Replication:—because, protesting that no such corrupt agreement was ever made between the said John Mabblerley and the said J. Wilkes as in that plea is mentioned, for replication in this behalf, the said T. Mulliner says, that the said J. Wilkes did not, in pursuance of any such corrupt agreement, nor for any such purposes as are in the said plea mentioned, make and deliver to the said J. Mabblerley the said promissory note in that plea and in the said first count of the said declaration mentioned, in manner and form as the said J. Wilkes has above, in that plea, alleged; and of this the said T. Mulliner puts himself upon the country, &c. Demurrer and causes assigned that the replication *ought to have concluded with a verification; that it put several matters in issue; that it does not allege the [*219] note to have been given for any valuable consideration; and that the replication should have concluded, “And this he, the said T. Mulliner, prays may be inquired of by the country.” Joinder in demurrer.

Lawrence, for the demurrer, said, that the cause of demurrer upon which he meant to insist was, that the replication ought to have concluded with a verification. He said that the rule was, that where the whole contents of the plea were denied, the conclusion must be to the country; but that where a

¹ During the whole of this term Mr. Justice *Ashurst* was absent in the Court of Chancery.

² S. C. cited 2 T. R. 441.

particular fact only is denied, there it must conclude with a verification; that here the whole contents of the plea were not denied, but that a particular fact was selected. He cited *Smith v. Dovers*, B. R., T. 20 G. 3, ante, vol. ii. p. 428, as expressly in point.

Law, contra.—There are a great variety of cases on this subject. Of these, *Crogate's case*, B. R., M. 6 Jac. 1, 8 Rep. 67, is the first. Where all the facts of the plea are put in issue, the replication may conclude to the country; but where the replication introduces new matter, it must conclude with a verification. This was the case in *Baynham v. Matthews*, B. R., T. 4 G. 2, 2 Str. 871, where the replication was, that the note was given for a just debt, *absque hoc quod corrupte agreeatum fuit modo et forma*. That the note was given for a just debt was a new matter, for the note was not necessarily given for a debt. So in *Smith v. Dovers* the replication stated that the bill was drawn and delivered to the plaintiff for a good and valuable consideration, which was new matter. The true difference between that case and the present is, that here the replication contains a denial of all the facts in the plea. It is as general as the replication, *de injuria*, &c. It is more proper than the usual issue on the corrupt agreement; for there may have been a corrupt agreement, and yet the note may not have been given in pursuance of it; but here the issue is that the note was not given in pursuance of any such corrupt agreement, nor for any of the purposes in the plea mentioned. This is a complete denial of the whole plea. [BULLER, J.—You have protested [220] against the corrupt agreement, and therefore for the purposes of this replication you admit it. The plea contains two parts, and you have put only one in issue.]

Lawrence, in reply.—If the whole of the plea had been put in issue, there would have been no use in the protestation. [Lord MANSFIELD inquired from *Law* what was the use of the protestation. *Law* said, that he thought it frivolous, and of no use; that it was an exclusion of a conclusion in another action. BULLER, J.—The use of a protestation is, to prevent the matter from operating as an admission in another cause; but in the cause in which it is used it admits the matter.]

BULLER, Justice.—The case most like the present, in favor of the plaintiff, is the replication to the plea of accord and satisfaction: but the true rule is, that wherever you put in issue the whole plea, you must conclude to the country. See *Boyd v. Whitaker*, B. R., H. 19 G. 3, ante, vol. i. p. 97; but where you select part only, you must conclude with an averment.¹ Here there are two facts in the plea,—the corrupt agreement, and the note given in consequence of it. One fact is admitted, and the other alone denied. I have

¹ It is observed by Mr. Sergeant *Williams* (1 Saund. 103 b. n.), that this rule, that where a particular fact is selected and denied the conclusion must be with an averment, is not universally true, and that many instances may be mentioned where the conclusion in such case must be to the country. He then mentions the case of an avowry that the plaintiff held the premises from such a time under a certain demise, and that so much rent was in arrear; in which case the plea denying that any rent was in arrear must conclude to the country. So, he adds, where to a plea of accord and satisfaction (the case referred to by BULLER, J.), the replication denies that the plaintiff received in satisfaction, it must conclude to the country; and other instances might be mentioned. In the notes of Mr. Wilson, the following instances are stated to have been collected by Mr. Gibbs: 1. *De injuria sua propria absque residuo causæ*; 2. Plea to covenant, that defendant has repaired, though the deed remains undenied; 3. Plea by an assignee, denying the assignment; 4. To a general avowry for rent under the statute, a plea denying the holding only; 5. To a plea of payment accepted in satisfaction, a replication that the defendant did not pay in satisfaction; 6. To a like plea, replication protesting against the payment, and denying the acceptance in satisfaction. Lilly, 121.

often wondered at what DENISON, J., *said in *Robinson v. Rayley*, [*221] B. R., E. 30 Geo. 2, 1 Burr. 320, and have thought it not to be supported on any principle.¹ There is no case which says that a traverse with an inducement should not conclude to the Court,* therefore that is the safer way.

After a great deal of conversation between the Court and the bar, *Law* had leave to amend the replication by striking out the protestation and concluding with a verification.

¹ The part of DENISON's, J., judgment, referred to by BULLER, J., is as follows: "He cited a case (of an alternate way of traversing a corrupt agreement), which was in M. 5 G. 1, B. R., *Fenn v. Alston*, where it was holden that the plaintiff has a liberty either to reply that the bond was given upon another account, and to traverse the corrupt agreement with an *absque hoc*, or to deny the corrupt agreement directly, and conclude to the country. And the case of *Baynham v. Matthews*, 2 Str. 871, goes upon the very same foundation, and mentions the same alternative." In *Hedges v. Sandon*, B. R., E. 28 Geo. 3, 2 T. R., 443, on the principal case being cited, BULLER, J., observed, "It is said that I expressed a doubt in the case of *Mulliner v. Wilkes*, whether what was said by DENISON, J., of *Baynham v. Matthews*, viz., that the conclusion is proper either way, was correct; but I am now satisfied that what he said was right." See 1 Saund. 103 c. a.; *Bush v. Leake*, B. R., T. 23 G. 3, post; *Slater v. Carne*, H. 25 G. 3, post, vol. iv.

² The true principle upon which it has been held that a traverse with an inducement must conclude with a verification is explained by Mr. Sergeant Stephen in his excellent *Treatise on the Principles of Pleading*, p. 203, 1st edit.: "With respect to the verification, this conclusion was adopted in a special traverse in a view to another rule, viz., that wherever new matter is introduced in a pleading, it is improper to tender issue, and the conclusion must consequently be with a verification. The inducement, setting forth new matter, makes a verification necessary, in conformity with that rule." And again: "To this exception belongs the case formerly noticed of special traverses. These, as already explained, never tender issue, but always conclude with a verification; and the reason seems to be, that in such of them as contain new matter in the inducement, the introduction of that new matter will give the party a right to be heard in answer to it if the *absque hoc* be immaterial, and consequently makes a tender of issue premature. And on the other hand, with respect to such special traverses as contain no new matter in the inducement, they seem, in this respect, to follow the analogy of those first mentioned, though they are not within the same reason." p. 251.

*The KING v. The Inhabitants of HOPE MANSELL. May 14. [*222]

(Reported, CALDECOTT, 252.)

The KING v. The Inhabitants of ST. NICHOLAS, GLOUCES-
TER. May 17.

(Reported, CALDECOTT, 262.)

The KING v. The Inhabitants of MITCHAM. May 17.

(Reported, CALDECOTT, 276.)

HOSKINS v. PICKERSGILL.¹ May 19.

An insurance upon a ship employed in the Greenland trade, on "ship, tackle, apparel, and furniture," does not, by the usage of the trade, cover the fishing-tackle.

¹ S. C. cited *Park Ins.* 77, 6th ed.; *Marshall Ins.* 727, 2d ed.

THIS was an action on a policy of insurance at and from London to Greenland, during the ship's stay there, and back again, on ship, tackle, apparel, and furniture, in the usual way. At the trial before Lord MANSFIELD, a question arose whether the fishing-tackle for the Greenland trade was covered by the above general words of the policy. There was contradictory evidence as to the usage in the Greenland trade of insuring the tackle in express terms. Lord MANSFIELD said, that no doubt the boat's rigging and stores belonging to the ship were included; but that as to the fishing-stores, it must depend upon the usage of the trade, the evidence of which was contradictory. A verdict having been found for the plaintiff, a rule was obtained to show cause why there should not be a new trial.

Baldwin showed cause, and contended that this was a question of usage properly left to the jury on the contradictory evidence; and that as the jury had decided it, the Court would not interfere.

[*223] **Lee*, S. G., contra.—The insurance was for £2000, and the ship alone was worth more than that sum; and the evidence of the usage of trade was very strong in favor of the defendants. The plaintiff's own witness stated that the custom of late years had been to insure the fishing-tackle separately.

Lord MANSFIELD.—The jury seem to have had some knowledge of the subject themselves, for certainly the weight of evidence was with the defendant.

WILLES, Justice.—The evidence is certainly in favor of the defendant, and I think it a proper case for a new trial.

Rule absolute, on payment of costs.¹

¹ So in a late case a London jury found in a special verdict, that "According to the usage of trade, where policies of insurance have been effected on ships, their tackle, apparel, munition, and furniture, which ships are employed in the Greenland fisheries, and losses have happened to such ships and their fishing-stores, such stores have not been, and are not, covered by such policies." *Gale v. Laurie*, B. R., H. 6 & 7 G. 4, 7 Dowl. & Ry. 711; S. C., 5 B. & C. 159. It is said by Lord ELLENBOROUGH, in *Hill v. Patten*, B. R., E. 47 G. 8, 8 East, 875, that the word outfit in a policy on a fishing-voyage includes the apparatus and instruments necessary for the taking of fish, seals, &c., and the disposing of them, when taken, in such a manner as to bring home the oil, blubber, bones, skins, and other animal produce of the adventure, with the greatest convenience and advantage. In the United States of America the different interests in fishing-voyages are universally described as consisting of the ship, the outfit, and the cargo. *Phillips on Insurance*, 72.

LEDGWICK v. CATCHPOLE. May 21.

(Reported, CALDECOTT, 291.)

[*224] *HIBBERT v. PIGOU.¹ May 21.

Sailing under the protection of an armed ship, not appointed by government as the convoy, is not a compliance with a warranty to depart with convoy.

The general rule is, that in order to constitute a sailing with convoy, sailing orders must be obtained.

THIS was an action upon a policy of insurance on the ship *Arundel*, from Jamaica to London, warranted to depart with convoy. At the trial before Lord MANSFIELD, the following facts appeared:—Lord Rodney, having

¹ S. C.; but without the arguments of counsel. *Park Ins.* 448, 6th ed.

sailed for England, left orders with Admiral Graves to go to Bluefields and take under his command ten ships of the line which were to assemble there, and proceed with the convoy to England. Admiral Graves, on the twenty-sixth of July, having then five ships of the line and fifty-one merchantmen, sailed from Bluefields, leaving no orders for the other ships. On the twenty-eighth of July, the Arundel arrived at Bluefields with the Jason and Glorieux,¹ Captain Cadogan, armed ships. Finding the convoy gone, Captain Cadogan, who had no other orders than the order to put himself under Admiral Graves's command, knowing that the admiral was going to England, sailed on that day or the next in quest of the fleet. The captain of the Arundel applied to Captain Cadogan for sailing orders: he said that he had none, but that if they did not overtake the fleet he would make out the orders. The Glorieux acted as convoy, and brought the Arundel into the middle of the fleet, off Cape Antonio, in Cuba, on the fifth of August, where she received sailing orders from Admiral Graves. It was proved that the Glorieux was part of the convoy, and that Admiral Rodney had ordered every ship of war going to join the convoy to take under its protection such ships as it should meet with. The Arundel was separated in a storm, and was subsequently taken.² The jury reluctantly found a verdict for the defendant; and a rule for a new trial having been obtained,

Wilson and Peckham showed cause. The convoy from *Jamaica [225] was under the orders of Admiral Graves, and none but the commander of the convoy could give sailing orders, the receipt of which constitutes a sailing under convoy. The Glorieux was indeed intended to form part of the convoy had she arrived in time at Bluefields; but not arriving in time, she could not herself form the convoy. The captain of the Glorieux had himself no sailing orders, and could not give any to the Arundel. The protection afforded to that vessel by the Glorieux was merely that which is constantly given by every man-of-war which meets a merchantman. It might have been otherwise if Admiral Graves had left ships behind him at Bluefields with orders to follow with such ships as might afterwards arrive. There was no necessity which could operate so as to excuse the sailing without convoy. It arose from the negligence of the captain of the Arundel in not reaching Bluefields before the twenty-sixth. There is no case in which it has been held that a departure without sailing orders is a sailing with convoy, except one, and there the captain was prevented by tempestuous weather from sending his boat for the orders; and the jury found, that as the captain had done everything in his power, it was a departing with convoy. *Victorin v. Cleeve*, B. R., H. 19 Geo. 3, 2 Str. 1250. See 1 B. & P. 6; 2 B. & P. 172.

Lee, S. G., Cowper, and Piggot, contra.—The terms of the contract are, that the vessel shall sail with convoy for the voyage from Jamaica. There was no stipulation as to time in the warranty, and therefore the vessel might sail when she pleased, and under any convoy. There was a sailing under the convoy of Admiral Graves; but if not, there was a sailing under the sufficient convoy of the Glorieux. It is competent to the commander of a convoy to appoint the place of rendezvous; and here it appears that Admiral Graves meant to wait in some place until the ships which he had left behind, viz., five out of the ten forming the convoy, should join him. The Arundel having, in fact, joined Admiral Graves at Cape Antonio, which must be taken to have been the place of rendezvous, sailed under his convoy. Sup-

¹ Whether or not the Glorieux had received orders to join Admiral Graves, and to form part of the convoy, does not appear to have been clearly proved at the trial.

² Forty-eight other ships were left behind by Admiral Graves, all of which lost their insurance.

pose that the admiral had sent off first two of his ships, and then two more, to convoy such of the merchantmen as were ready, with directions to wait [226] for the *rest off Cape Antonio—would all the ships which sailed with fewer than the whole convoy appointed sail without convoy? Ships from the north of Jamaica never join the convoy till a day or two's sail beyond Bluefields: and yet they are held to sail with convoy from Jamaica. See *Audley v. Duff*, C. B., H. 40 G. 3, 2 B. & P. 115; *Warwick v. Scott*, 4 Campb. N. P. C. 62; *Park Ins.* 448, 6th edit. But supposing the facts not to show a sailing under the convoy of Admiral Graves, yet the sailing under the convoy of the *Glorieux* was sufficient. On the arrival of the *Arundel* at Bluefields there was no other convoy than that of the *Glorieux*; and if the captain had waited for the appointment of another convoy, would he not have been culpable? The *Glorieux* acted in every respect as a convoy, except in not giving sailing orders; and the case of *Victorin v. Cleeve* shows that sailing orders are not in every case necessary. The captain of the *Arundel* did all that was required of him. He applied for sailing orders, and was told that he should have them in case they did not overtake the fleet. It has been said in many cases, that if the one party means to give sailing orders, and the other to take them, it is sufficient, though the orders be not actually received. Captain Cadogan was bound to protect the *Arundel*, and would have been punishable if he had omitted to do so.

Lord MANSFIELD.—Although both the underwriter and the insured are equally innocent, one cannot help feeling an inclination, and my leaning has been and is in favor of the insured. But it is impossible to doubt when the facts are rightly understood. An hypothetical contract differs from a conditional contract. The latter admits of argument, and latitude of construction; it may be performed *cy pres*, and according to equity; but the former depending upon a certain event taking place, the only question is, has that event happened, or has it not? It may be a subject of regret, if, by the act of a third person, the event has never occurred; but the Court can afford no relief. The event in this case is, the ship departing with convoy from Jamaica to London. The usage of trade is this: Government appoints a convoy, and the place of rendezvous. According to this usage, the rendezvous being at Bluefields, a ship sailing from Jamaica begins her voyage under convoy at Bluefields. If Lord Rodney had said nothing to the captain [227] *tain of the *Glorieux* about protecting such ships as he might meet with, he would nevertheless have taken under his protection any English ship he happened to meet. But this would not have been a convoy. The convoy is that force under which government has put the trade, and a ship cannot choose her own convoy. The trade trusts to government. The Admiral of the convoy knows how to act: he has particular orders, and the merchant-ships must act according to his orders. The case here is, that Lord Rodney appoints Admiral Graves to go to Bluefields and take under his command ten ships of the line, which are to meet him there, with which he is to proceed with the convoy to Great Britain. When the ships join they receive sailing orders, which are very material, for they appoint signals, &c.; so that sailing orders, as to the business of the fleet, are of the essence of a convoy. On the twenty-sixth of July, Admiral Graves, for what reason does not appear, sails for England. He does not leave orders for a single ship. He gives no directions for any vessel to follow him. He does not say a word about Cape St. Antonio: if he had, it might have made a great alteration. The *Arundel* arrived at the place of rendezvous two days after the convoy sailed. She sailed from Bluefields in company with the *Glorieux*; but the latter vessel had no orders, and was not a convoy. They came up with the fleet by accident off Cape St. Antonio. Under these circumstances it ap-

pears to me that there was no equity on either side, and that the jury have done right.

WILLES, Justice.—As the case is of consequence, I shall make no apology for differing in opinion with Lord MANSFIELD. I admit that the warranty must be complied with; but my doubt arises upon the state of the facts. The warranty here was general to depart with convoy. No particular time was mentioned, and no particular convoy was in contemplation: it was sufficient therefore to sail under any convoy. I think that, substantially, the terms of the contract have been complied with.¹ There was no fraud, nor any laches on the part of the captain of the *Arundel*. He did all he could. He put himself under the protection *of the *Glorieux*, which was [*228] part of the convoy; and it is not said that she was an insufficient convoy. The *Arundel* was under the protection of that vessel from the time she met with her, and she was not lost until after they had both joined the grand convoy. The case of *Victorin v. Cleeve* is the only one I have met with on the subject, and there sailing orders were dispensed with because the captain had done everything in his power to obtain them. The captain of the *Arundel* did the same. I think the verdict unjust.

BULLER, Justice.—We are not called upon at present to say whether sailing orders are essential in all cases. I am inclined to think that they are not in all cases, though always to be wished. Laying that out of the case, the question here is, did the *Arundel* sail with convoy? A warranty like this is a condition which must be strictly and literally complied with. It is immaterial whether the captain of the *Arundel* did all he could to procure a convoy or not; the warranty must still be complied with. Whether it was complied with or not is a question of fact, and the facts show that the ship departed without convoy. Only one convoy was appointed by government, and that convoy was under the orders of Admiral Graves. It must be shown that the *Arundel* sailed under Admiral Graves, or she did not sail with convoy. It is not an immaterial part of the case, that the admiral did not leave any orders behind him. But it is said that the *Glorieux* was part of the convoy: I say that she was not part of the convoy under the orders of Admiral Graves. It is true that it is immaterial what force the convoy consists of, but it must be such as the government appoints. Did the *Arundel* sail under the convoy appointed by government? I think that she did not, and that the rule ought to be discharged.

Rule discharged.

Another action was brought upon the same policy against another of the underwriters, when the jury found a verdict for the plaintiff. "Although a verdict in that case was found for the plaintiff," says Mr. Justice PARK, "yet it seems to me to leave the doctrines above advanced unshaken; for upon the second trial it was proved, beyond all doubt, that the *Glorieux* was in truth a part of the convoy, a fact *which was left doubtful at the trial; and it was upon that fact that Lord MANSFIELD and Mr. [*229] Justice BULLER chiefly relied."—Park Ins. 446 (n.), 6th ed.²

¹ So it is said by HARRIS, J., that "it has always been understood that provisions for departure with convoy have relation to the custom of trade and the orders of government, and ought, therefore, to receive a liberal construction." Audley v. Duff, C. B., H. 40 G. 8, 2 B. & P. 115.

² Mr. Justice ASHURST was absent, being appointed one of the Lords Commissioners of the Great Seal.

³ The question as to the necessity of a ship obtaining sailing orders arose in two cases on the loss of the same vessel, the *Golden Grove*. In the first case the rule was thus laid down by Mr. Justice BULLER: "In point of law, the general proposition is, that sailing instructions are necessary. I have never decided this point myself, but it has often been determined at Guildhall. In *Hibbert v. Pigou*, my ex-

pression is, 'It is not necessary to say whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary.' And the case of *Victorin v. Cleeve*, goes no further. If the captain from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy; but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with; the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not, in effect, put himself under the protection of the convoy, and therefore the underwriters are not benefitted." *Webb v. Thompson*, C. B., E. 37 G. 8, 1 B. & P. 6. The same doctrine is also laid down by Lord Eldon, C. J., in the other case arising out of the loss of the *Golden Grove*. *Anderson v. Pitcher*, C. B., E. 40 G. 8, 2 B. & P. 164; 8 Esp. N. P. C. 124, S. C. But where the ship applies for sailing orders, which are refused by the commander of the convoy, it must be presumed that they are refused for the benefit of trade, protected by the convoy, and they will not be essential to constitute a sailing under convoy. *Veodon v. Wilmot*, 1744, *cor. Lam*, C. J., *Park Ins.* 444 (n.), 6th ed.; 2 B. & P. 170, 171. See also *France v. Kirwan*, 88 G. 8, *coram* Lord Kenyon, Id. 447; *Emerigon*, vol. i. p. 171; *Valin*, vol. i. p. 691; *Abbott on Shipping*, 229, 6th ed. The convoy act, 18 G. 8, c. 57, expired with the war.

MARTIN *v.* WINDER. *May* 21.

(Reported, *ante*, vol. i. p. 199 n.)

The KING *v.* The Justices of HUNTINGDONSHIRE. *May* 21.

(Reported, CALDWORTH, 283.)

[*230] *BREWER, on the demise of Lord ONSLOW, *v.* EATON.¹ *May* 22.

In an ejectment under the 4 Geo. 2, c. 28, on a right of re-entry for non-payment of rent, the taking an insufficient distress after the forfeiture for rent accruing before is not a waiver of the right to re-enter.

LORD ONSLOW demised to the defendant, for twenty-one years, at a rent payable at Lady-day and Michaelmas. The lease contained a clause of re-entry if the rent should be in arrear twenty-one days. On the second of December, Lord Onslow distrained for the sum of £200, being two years' rent due at Michaelmas, 1782, but took goods only to the amount of £20. The goods were replevied, and the replevin suit was still depending. In January, 1783, Lord Onslow brought ejectment on the forfeiture, laying the demise in October, previous to the distress. At the trial of the ejectment, before ASHURST, J., it was objected, that Lord Onslow, by distraining, had waived the forfeiture, and that he was not therefore entitled to recover. The learned Judge refused to nonsuit the plaintiff, but gave leave to the defendant (the jury having found a verdict for the plaintiff) to move for a new trial. *Morgan*, having obtained a rule to show cause,

Erskine now showed cause.—This is a proceeding under the statute 4 Geo. 2, c. 28. Had it been a proceeding at common law, it must be admitted that the distress would have been a waiver of the forfeiture; but it is otherwise under the statute, which is meant to operate unless the whole rent has been paid.

Morgan, *contra*.—The statute gives no right of entry where none existed

¹ S. C. cited 6 T. R. 220.

before: its only operation is to facilitate the proceeding. Before this statute, great difficulties existed as to the making an actual entry. Lib. Ass. 14 Ed. 3, pl. 10, Co. Litt. 201, 3 Bl. Com. 206. To obviate these the statute was passed. The distress was a waiver of the right of re-entry; and at the time of the ejectment brought, the landlord had no right of entry.

LORD MANSFIELD.—The statute speaks of a landlord "who hath by law a right to re-enter," which means a right to re-enter reserved to him in the lease. At common law, the distress operated as a waiver of the forfeiture which incurred on the non-payment; but here the distress affords no presumption that the landlord has waived the forfeiture, because, *as the statute requires him to prove on the trial that no sufficient distress [231] was to be found on the premises countervailing the arrears due, he has distrained in order to complete the title given him by the statute.

WILLES, Justice.—The lessor of the plaintiff had two remedies; one by distress, the other by re-entry. At common law, the distress waived the re-entry; but the statute restores that remedy where by common law it was taken away.

BULLER, Justice.—I am of the same opinion.

Rule discharged.¹

¹In *Cheney v. Batten*, B. R., H. 15 G. 3, Cowp. 246, ASHTON, J., says, "where an ejectment has been brought on the stat. 4 G. 2, c. 28, s. 2, for the forfeiture of a lease, there being half a year's rent in arrear, and no sufficient distress on the premises, there acceptance of rent by the landlord has, I believe, been held a waiver of the forfeiture of the lease." So an action of covenant for rent accruing subsequent to the time of the demise laid in the declaration has been held to be a waiver of the forfeiture. *Roe*, dem. *Crompton v. Minshal*, B. R., E. 38 G. 2, Buller N. P. 96; 2 Selw. N. P. 677, 4th ed., S. C. Where a lease contained a proviso for re-entry in case the rent should be twenty-one days in arrear, and there should be no sufficient distress on the premises, and within the twenty-one days the landlord distrained, and continued in possession until after the expiration of the twenty-one days, when he brought ejectment for the forfeiture, Lord ELLENBOROUGH ruled that this was no waiver. His Lordship said, "The only question is, whether by the act of distraining and continuing in possession the forfeiture was waived. A right which had accrued at the time of the distress might have been waived by it, but the party is not estopped as to any right which accrued subsequently." *Doe*, dem. *Taylor v. Johnson*, 1 Stark. N. P. C. 411.

The principal case is cited in *Goodright*, dem. *Charter v. Cordwent*, B. R., E. 35 G. 3, 6 T. R. 220, for a *dictum* of Lord MANSFIELD, which is given in the following words: "It is like the receipt of rent after the demise, about which there has been so long a puzzle. This is now finally settled to be no objection. It is receiving what the landlord might recover in an action for the mesne profits." To this doctrine, Lord KENYON, in the case cited, refused to subscribe. In the notes of Mr. Justice LAWRENCE, the passage is thus given: "Settled now that the receipt of rent [due] after demise, which used to be the same puzzle, is no bar, but that it depends whether there was an agreement." The word [due] appears to have been inserted by the reporter afterwards. In the note-book of Mr. Justice LE BLANC, the sentence is this: "Like case of a man's receiving rent till of late years, but now finally settled that that depends whether there was any agreement to waive the ejectment." From these reports it *appears that Lord MANSFIELD merely intended to repeat the doctrine laid down by him in *Doe*, dem. *Cheney v. Batten*, B. R., H. 15 [232] G. 3, Cowp. 246, "that the question is *quo animo* the rent was received, and what the real intention of both parties was."

GREGSON v. GILBERT.¹ May 22.

Where the captain of a slave-ship mistook Hispaniola for Jamaica, whereby the voyage being retarded, and the water falling short, several of the slaves died for want of water, and others were thrown overboard, it was held that these facts did

¹S. C., but without the arguments of counsel. Park Ins. 82, 6th ed.

not support a statement in the declaration, that by the perils of the seas, and contrary winds and currents, the ship was retarded in her voyage, and by reason thereof so much of the water on board was spent, that some of the negroes died for want of sustenance, and others were thrown overboard for the preservation of the rest.

THIS was an action on a policy of insurance, to recover the value of certain slaves thrown overboard for want of water. The declaration stated, that by the perils of the seas, and contrary currents and other misfortunes, the ship was rendered foul and leaky, and was retarded in her voyage; and, by reason thereof, so much of the water on board the said ship, for her said voyage, was spent on board the said ship: that before her arrival at Jamaica, to wit, on, &c., a sufficient quantity of water did not remain on board the said ship for preserving the lives of the master and mariners belonging to the said ship, and of the negro slaves on board, for the residue of the said voyage; by reason whereof, during the said voyage, and before the arrival of the said ship at Jamaica—to wit, on, &c., and on divers days between that day and the arrival of the said ship at Jamaica—sixty negroes died for the want of water for sustenance; and forty others, for want of water for sustenance, and through thirst and frenzy thereby occasioned, threw themselves into the sea and were drowned; and the master and mariners, for the preservation of their own lives, and the lives of the rest of the negroes, which for want of water they could not otherwise preserve, were obliged to throw overboard 150 other negroes. The facts, at the trial, appeared to be, that the ship on board of which the negroes who were the subject of this policy were, on her voyage from the coast of Guinea to Jamaica, by mistake got to leeward of that island, by mistaking it for Hispaniola, which induced the captain to bear away to the leeward of it, and brought the vessel to one day's water before the mistake was discovered, when they were a month's voyage from the island, against winds and currents, in consequence of which the [*233] negroes were thrown *overboard. A verdict having been found for the plaintiff, a rule for a new trial was obtained on the grounds that a sufficient necessity did not exist for throwing the negroes overboard, and also that the loss was not within the terms of the policy.

Davenport, Pigott, and Heywood, in support of the rule.—There appeared in evidence no sufficient necessity to justify the captain and crew in throwing the negroes overboard. The last necessity only could authorize such a measure; and it appears, that at the time when the first slaves were thrown overboard, there were three butts of good water, and two and a half of sour water, on board. At this time, therefore, there was only an apprehended necessity, which was not sufficient. Soon afterwards the rains came on, which furnished water for eleven days, notwithstanding which more of the negroes were thrown overboard. At all events the loss arose not from the perils of the seas, but from the negligence or ignorance of the captain, for which the owners, and not the insurers, are liable. The ship sailed from Africa without sufficient water, for the casks were found to be less than was supposed. She passed Tobago without touching, though she might have made that and other islands. The declaration states, that by perils of the seas, and contrary currents and other misfortunes, the ship was rendered foul and leaky, and was retarded in her voyage; but no evidence was given that the perils of the seas reduced them to this necessity. The truth was, that finding they should have a bad market for their slaves, they took these means of transferring the loss from the owners to the underwriters. Many instances have occurred of slaves dying for want of provisions, but no attempt was ever made to bring such a loss within the policy. There is no instance in

which the mortality of slaves falls upon the underwriters, except in the cases of perils of the seas and of enemies.

Lee, S. G., and Chambre, contra.—It has been decided, whether wisely or unwisely is not now the question; that a portion of our fellow-creatures may become the subject of property. This, therefore, was a throwing overboard of goods, and of a part to save the residue. The question is, first, whether any necessity existed for that act. The voyage was eighteen weeks instead of six, and that in consequence of contrary winds and calms. It was impossible to regain the island of Jamaica in less than three weeks; but it is said that *other islands might have been reached. This is said from the [*234] maps, and is contradicted by the evidence. It is also said that a supply of water might have been obtained at Tobago; but at that place there was sufficient for the voyage to Jamaica if the subsequent mistake had not occurred. With regard to that mistake, it appeared that the currents were stronger than usual. The apprehension of necessity under which the first negroes were thrown overboard was justified by the result. The crew themselves suffered so severely, that seven out of seventeen died after their arrival at Jamaica. There was no evidence, as stated on the other side, of any negroes being thrown overboard after the rains. Nor was it the fact that the slaves were destroyed in order to throw the loss on the underwriters. Forty or fifty of the negroes were suffered to die, and thirty were lying dead when the vessel arrived at Jamaica. But another ground has been taken, and it is said that this is not a loss within the policy. It is stated in the declaration that the ship was retarded by perils of the seas, and contrary winds and currents, and other misfortunes, &c., whereby the negroes died for want of sustenance, &c. Every particular circumstance of this averment need not be proved. In an indictment for murder it is not necessary to prove each particular circumstance. Here it sufficiently appears that the loss was primarily caused by the perils of the seas.

LORD MANSFIELD.—This is a very uncommon case, and deserves a reconsideration. There is great weight in the objection, that the evidence does not support the statement of the loss made in the declaration. There is no evidence of the ship being foul and leaky, and that certainly was not the cause of the delay. There is weight, also, in the circumstance of the throwing overboard of the negroes after the rain (if the fact be so), for which, upon the evidence, there appears to have been no necessity. There should, on the ground of reconsideration only, be a new trial, on the payment of costs.

WILLES, Justice, of the same opinion.

BULLER, Justice.—The cause of the delay, as proved, is not the same as that stated in the declaration. The argument drawn from the law respecting indictments for murder does not apply. There the substance of the indictment is proved, though the instrument with which the crime was effected be different from that laid. It would be dangerous *to suffer the plaintiff to recover on a peril not sustained in the declaration, because it [*235] would not appear on the record not to have been within the policy, and the defendant would have no remedy. Suppose the law clear, that a loss happening by the negligence of the captain does not discharge the underwriters, yet upon this declaration the defendant could not raise that point.

Rule absolute on payment of costs.*

*It was probably this case which led to the passing of the statutes 30 G. 3, c. 33, s. 8, and 34 G. 3, c. 80, s. 10, prohibiting the insurance of slaves against any loss or damage except the perils of the seas, piracy, insurrection, capture, barratry, and destruction by fire; and providing that no loss or damage shall be recoverable on account of the mortality of slaves by natural death or ill-treatment, or against loss

by throwing overboard on any account whatsoever. See *Tatham v. Hodgson*, B. R., E. 36 G. 3, 6 T. R. 658. As to insurance upon animals which have been killed by the perils of the seas, see *Lawrence v. Aberdein*, B. R., M. 2 G. 4, 5 B. & A. 107; *Gaby v. Lloyd*, B. R., H. 5 & 6 G. 4, 8 B. & C. 798.

The KING *v.* The Inhabitants of TOTTINGTON LOWER END. *May* 24.

(Reported, CALDERCOTT, 284.)

PALMER *v.* EDWARDS. *May* 24.

(Reported, ante, vol. i. p. 187 n.)

GOODWIN *v.* MONTAGUE.¹ *May* 26.

The sheriff having returned the writ, may be ruled on the same day to bring in the body; and if he disobeys, may be attached; but the Court will, at the instance of the defendant, set aside the attachment on payment of costs, in case there are merits.

MORGAN moved, on Saturday, to set aside an attachment against the sheriff for irregularity. The sheriff had been ruled to return the writ, and had the whole of the 12th of May to return it; and if he had not returned it till night he could not have been ruled to bring in the body till the 13th, and of course, could not have been attached till the 17th: [*236] but the sheriff having returned the writ early on the 12th, was ruled that day to bring in the body; and not having obeyed the latter rule, an attachment went. *Morgan* contended, that the rule to bring in the body, could not regularly issue till the 13th, for the sheriff ought not to have returned the writ till the last moment: but the Court said he might and ought to return it as soon as possible, and refused the motion; Accord. *Parker v. Wall*, B. R., M. 26 G. 3, 1 Tidd's Pr. 312, 8th ed.

Morgan now moved to set aside the attachment on payment of costs and on a suggestion of merits.²

Wood, contra, said that the only merits were infancy; but *Morgan* undertaking not to set up that defence, the Court Granted the rule.

¹S. C. cited 1 Tidd's Pr. 312, 316, 8th ed.

²The Court now requires an affidavit of merits. B. M. 59 G. 3, 2 B. & A. 240; 1 Tidd's Pr. 316, 8th ed.

The KING *v.* The MAYOR, &c., of COVENTRY. *May* 26.

Rule for a mandamus to admit the prosecutor to the freedom of a corporation, absolute in the first instance.

In the beginning of this term *Douglas* moved for a rule to show cause why a mandamus should not go to admit the prosecutor to the freedom of the corporation of Coventry. The officer, conceiving it to be the usual course, drew it up as absolute in the first instance, and the writ accordingly issued. Some days afterwards *Lane* moved to enlarge the rule (supposing it to be a

rule *Nisi*) till a day near the end of the term, which was granted. But to-day *Lane* mentioned that the mandamus had issued, and desired the Court to let the matter come on as a rule to show cause. *Douglas* made no objection, but the Court (*WILLES* and *BULLER, JJ.*), after talking with the officers, said, that the course was for the writ to go in the first instance, and refused *Lane's* application.⁴

¹ "Where it is to swear or to admit, the Court will, in case the right appear plain, grant the writ upon the first motion. But where it is to restore one who has been removed, they would first grant a rule to show cause why such a writ should not issue." *Buller* N. P. 199; see *R. v. Mayor of Truro*, M. 1816, 2 Chitty 257, and *Lichester's* case there cited.

*The KING v. The Inhabitants of IVESTON. May 28. [*237]

(Reported, CALDECOTT, 288.)

The KING v. PICKERSGILL. May 28.

(Reported, CALDECOTT, 297.)

The KING v. HORNER. May 30.

(Reported, CALDECOTT, 295.)

The KING v. SIMMONS. May 30.

The Court will grant a rule for a mandamus to serve the office of mayor, upon an affidavit merely stating the election and refusal.

A RULE was obtained to show cause why the defendant should not take upon himself the office of mayor of Falmouth. The motion was made upon an affidavit stating, simply, that the defendant had been elected mayor, and had refused.

Bearcroft showed cause, and contended that it was usually stated in such affidavits that the mayor was a justice of the peace, and that unless some such ground were laid, the Court would not interfere as to the service of the office of mayor, which in itself was a mere private matter. He insisted, also, that the application was too late, half a year having expired, and two terms having elapsed; but if the Court thought the motion well grounded, the defendant had an answer to it, which was, that there was a by-law imposing a penalty of £12 for non-service, which the defendant was ready to pay.

Hill, Serj., contra.—The mandamus gives a specific relief; and there are cases in which the Court has granted mandamuses to serve the office of mayor, without stating any other ground than is made here. As to the by-law, every man in the borough might make the same choice, of paying the penalty rather than serve.

Per Cur. They have been six months without a mayor, but that is no reason why they should be other six months. Rule absolute.

*The KING v. The Inhabitants of WINTERSETT. May 31. [*238]

(Reported, CALDECOTT, 298.)

The KING v. STEVENS. May 31.

(Reported, CALDECOOTT, 802.)

ARGENT v. The DEAN and CHAPTER of ST. PAUL'S.¹ June 2.

An *essoin* does not lie for a corporation, nor in a personal action.

THIS was an action for a false return to a mandamus under the seal of the corporation. The corporation having cast an *essoin*, a rule had been obtained to show cause why that *essoin*, should not be quashed.

Law showed cause.—An action lies against any of the members of a corporation, by their private names, for a false return to a mandamus. The King v. The Corporation of Ripon, B. R., T. 12 W. 3, Com. 86; Rich v. Pilkington, B. R., H. 2 & 3 W. 3, Carth. 171. But it is said that this is a personal action, and that therefore an *essoin* does not lie; and the case of Simons v. The Mayor of Totness, C. B., H. 12 G. 2, Cook's Cases in C. B., will be relied upon. Anciently *essoins* were allowed in personal actions; 2 Inst. 125; and it is said by Booth, in his Treatise on Real Actions, Chap. 5, p. 14, that it lies for the plaintiff and defendant in personal actions. There are other authorities to the same effect; Freshwater v. Reus, B. R., M. 2 Jac. 1, 1 Brownl. 193; Barclay v. Easte, B. R., T. 16 G. 2, 2 Str. 1194. In Anson v. Jefferson, C. B., E. 3 G. 3, 2 Wils. 164, PRATT, C. J., said, "I cannot say that *essoins* may not be allowed in personal actions."

Lord MANSFIELD.—There are two reasons against you: 1. That no *essoin* lies for a corporation; and, 2. You rely on Lord COKE, whose opinion is evidently against you. So in Anson v. Jefferson, PRATT, C. J., says, that it is an obsolete practice, and a great abuse of the law.

[*239] BULLER, Justice.—Since the time of Lord COKE, but at *what precise period does not appear, the Court have gone back to what ought to have been the practice. It certainly was prior to the 11 Geo. 2, when a case occurred in which this point was decided. The better opinion is, that it could not be since the statute of Marlbridge. Rule absolute.²

¹ S. C. cited 2 T. R. 16.

² See Rooke v. Earl of Leicester, B. R., T. 27 G. 3, 2 T. R. 16.

COCKSON v. DRINKWATER.¹ June 25.

Where an executor pleads the general issue and *plene administravit*, and the former plea is found against him, and the latter for him, he is entitled to the *postea*.

ASSUMPSIT against an executor on promises by the testator and himself. Pleas *non assumpsit* and *plene administravit*; the first of which was found for the plaintiff, and the latter for the defendant.

Bower moved for a rule to show cause why the *postea* should not be delivered to the defendant. He cited Hollingshead v. Mayo, M. 16 G. 3, and Nethel v. Garnon, probably Garnons v. Hesketh, B. R., E. 22 G. 3, 2 Tidd, 1016, 8th ed.

BULLER, Justice, added the case of Windhall v. Rushbury, M. 19 G. 3, and said, that there were other cases on the same subject, and that the point was completely settled. Rule absolute in the first instance.²

¹ S. C. cited Tidd's Pr. 1016, 8th ed.

² See Edwards v. Bethel, B. R., H. 58 G. 3, 1 B. & A. 254; Ragg v. Wells, C. B., M. 58 G. 3, 8 Taunt. 129; Tidd's Pr. 1016, 8th ed.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

IN THE TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.¹

The KING v. The Inhabitants of UPTON GRAY. June 25.

(Reported, CALDECOTT, 808.)

The KING v. EDWARD PRYSE LLOYD, Esq. June 25.

(Reported, CALDECOTT, 809.)

WRIGHT and Another v. LORD VERNEY. June 25.

Seems that a bond to a sheriff, the condition of which recites that the sheriff by virtue of a *fi. fa.* had seized and taken in execution, of the goods and chattels of R. V., divers goods and chattels, and that the sheriff, at the request of the obligor, had quitted possession, and agreed to return *nulla bona*, and then for indemnifying the sheriff for so doing, is illegal.

DEBT on bond. The defendant prayed *oyer* of the bond and condition. The bond was from the defendant and two others to the plaintiffs, sheriff of Middlesex, for £3000. The condition recited that the plaintiffs, sheriff of Middlesex, by virtue of a *fi. fa.* at the suit of W. Burke and C. Hargrave, had seized and taken in execution of the goods and chattels of the said Sir Ralph Verney, in the bailiwick *of the said sheriff, divers goods and chattels to the amount in value of the money so directed to be levied [*241] by virtue of the said writ. That the said sheriff, at the request of the said defendant, had quitted possession, and agreed to return to the said writ, that the defendant had no goods and chattels in his bailiwick. The condition was to indemnify the sheriff for all costs, charges, &c., by reason of quitting the possession or returning the writ, in manner above mentioned. The defendant then pleaded that the plaintiffs were not damnified by quitting possession, or returning the writ as aforesaid. Replication, That the plaintiffs,

¹ During this term Mr. Justice ASHURST was absent in the Court of Chancery.

in pursuance of the said agreement, did return upon the said writ, that the said Sir Ralph Verney had no goods and chattels, &c., by reason whereof they were obliged to pay, and did pay, to the said W. B. and C. H. (the plaintiffs in the original action) the sum of £1484. Rejoinder, That the said plaintiffs were not damnified by reason of their returning the writ in manner in the said condition and replication mentioned; on which issue was joined. A rule having been obtained to show cause why the judgment should not be arrested, on the ground that the condition was illegal,

Davenport showed cause, and contended that it was usual and convenient to indemnify the sheriff in cases where the property in the goods is disputed, as where there is a settlement. [BULLER, J.—The condition recites “that the sheriff had levied of the goods of Lord Verney,” therefore this is not a case of disputed property.] Indemnity bonds do not usually recite the particular circumstances.

Morgan, contra, said, that the defendant did not mean, if the Court should determine in his favor, to take advantage of the decision, in order to make the sheriff lose the money. He only wanted time, having made over his estate to trustees for payment of his debts.

The Court seemed to be clearly of opinion that the bond was illegal, but in consequence of what was said by *Morgan*, they only enlarged the rule for a twelvemonth.

Rule enlarged.¹

¹ The usual form of this bond is, “Whereas the said sheriff, by virtue, &c. &c., hath seized and taken divers goods and chattels as the proper goods and chattels of the said C. D. in execution. And whereas the above-bounden J. K. hath given notice to the said sheriff, and claimed the said goods and chattels, and hath requested the said sheriff to quit possession,” &c. &c. Watson on Sheriffs, 380.

[*242] *The KING v. GEORGE PARKER.¹ June 28.

On a prosecution for perjury, where, on the part of the prosecution, the depositions of a deceased person were offered in evidence, and upon the cross-examination of the prosecutor's witness, certain declarations of the deceased witness, not upon oath, were proved for the purpose of corroborating the facts stated in his depositions, in a matter material to the defendant, it was held that evidence of such declarations was not admissible.

After a conviction for perjury it is no ground for a new trial that the jury hesitated in giving their verdict; nor will the Court receive affidavits of the jurymen stating that they did not intend to find a verdict of guilty.

THIS was an indictment for perjury, removed into this court, and tried at the last Huntingdon Assizes, before EYRE, B. The facts were as follows:

In February, 1781, the mail was robbed between Huntingdon and Wisbeach, and a bank note contained in it was soon afterwards found in the possession of one Fowler, who said he received it at Lynn, on the 20th of March, from two persons whom he did not know. Suspicion attaching to two persons of the names of Rys Masingarb and Bryan Hall, both of Wisbeach, Fowler was sent to look at them, and swore that they were the persons from whom he received the note. The defendant, who lived at Wisbeach, also made oath, before two justices of the peace, that he saw Masingarb and Hall in the street at Lynn, on the said 20th of March. Masingarb and Hall were, upon these informations, committed to prison, but were soon afterwards discharged. Fowler was tried for the robbery at the Huntingdon Summer Assizes, 1782, and acquitted, and died soon afterwards. On the

¹ This appears to be the case alluded to by Lord REDSDALE in the Berkeley Peerage Case. See 1 Phil. Ev. 292 (n), 6th ed.

trial of the present indictment Fowler's information, on oath, was read by the prosecutor to prove the introductory part of the indictment. It also came out, on the cross-examination of one Rayner, a witness for the prosecution, that Fowler had been sent to him at Wisbeach to see if he could recognise the persons from whom he had received the note: that he had carried him out into the street, where, on seeing Masingarb, he immediately said, "That is the man;" and that he afterwards recognised Hall in the same manner. Mr. Baron EYRE, after this evidence had been given, struck his pen through it, and left it out of his summing up to the jury. Hall was at Lynn on the 20th of March, but it was proved, by a number of witnesses, that Masingarb was not.

The jury brought in a verdict "Guilty, but not wilfully;" and being sent out again by the judge, returned, in a few *minutes, with a verdict of "Guilty." A new trial having been moved for last term, [243]

Graham and *G. Wilson*, for the defendant, contended that the evidence of Rayner ought to have been left to the jury; 1. Because it was not mere hearsay, but consisted partly of what Fowler did, of which, what he said was only explanatory; and they cited, on this point, *Lake v. Lake*, Canc. 1751, 1 Wils. 313, and *Thompson v. Trevannion*, B. R., Skinner, 402; see 6 East, 193, where hearsay, under particular circumstances, had been admitted; 2. Because what Fowler said was evidence to confirm what he said in his information on oath, which, having been read, was material on the part of the defendant to show that Masingarb, or at least some person very like him, was at Lynn on the day in question. To show that the declarations of a witness are evidence to corroborate what he says on oath, they cited *Lutterell v. Reynell*, B. R., M. 22 Car. 2, 1 Mod. 283. See also *Harrison's case*, 12 State Tr. 861; *Friend's case*, 13 State Tr. 32, *Gilbert's Evid.* c. 150, *Buller's N. P.* 294, 2 Hawk. P. C. 431. They also argued that there was not sufficient evidence of an intention to swear falsely, and that the doubt of the jury was in such case a ground for a new trial; and they offered to produce affidavits of two jurymen, that they did not mean to find the defendant guilty.

The Court (Lord MANSFIELD *absente*) stopped the Solicitor-General, who was on the other side. They would not suffer the affidavits to be read; see *B. v. Woodfall*, B. R., M. 11 G. 3, 5 Burr. 2667; *Clark v. Stevenson*, C. B., H. 13 G. 3, 2 W. Bl. 803; *Jackson v. Williamson*, B. R., H. 28 G. 3, 2 T. R. 281; *Davis v. Taylor*, B. R. 1815, 2 Chitty, 263; *Milson v. Hayward*, Scacc. H. 1 & 2 G. 4, 9 Price, 134, and were clear that the hesitation of the jury was not a ground for a new trial. BULLER, J., said that the same thing had been attempted on a similar verdict against one Milles, a quaker, tried before him for a false affirmation, and a new trial refused.

As to the point of evidence, WILLES, J., at first inclined to think it admissible, having come out on the cross-examination of a witness for the prosecution, but he afterwards retracted this opinion.

BULLER, Justice, said, that the evidence was clearly inadmissible, not being upon oath; and that whether Fowler *expressed himself by [244] words or by signs and gestures, made no difference. As to the other ground, he said that the information of Fowler was not read as evidence for the defendant; but if it had, it was now settled, that what a witness said not upon oath would not be admitted to confirm what he said upon oath; and that the case of *Lutterell v. Reynell* and the passage cited from *Hawkins* were not now law.¹

¹ See 1 Phill. Ev. 292, 6th ed.; 1 Stark. Ev. 149; 2 Russel on Crimes, 685, 2d ed.; Sir W. D. Evans, in his *Notes to Pothier on Obligations*, vol. ii. p. 251, has made the following observations on this subject, which appear to deserve great attention. "One of the cases which are mentioned as exceptions to the rule for excluding hearsay evi-

The Court, however, on some favorable circumstances in the evidence, although they did not think there was ground for a new trial, recommended it to the Solicitor-General to procure the defendant a pardon, which he undertook to do.

dence, is where it is adduced to show that the testimony given by a witness upon the trial is consistent with his declarations on former occasions; but it is said that this is not evidence in chief, and it is doubtful whether it be so in reply. 1 Mod. 288. According to the principles of correct reasoning, the propriety of the evidence in this case, as in the others already referred to, must depend upon the nature of the object which it is intended to attain. In an ordinary case the evidence would be at least superfluous, for the assertions of a witness are to be regarded in general as true until there is some particular reason for impeaching them as false; which reason may be repelled by circumstances, showing that the motive upon which it is supposed to have been founded could not have had existence at the time when the previous relation was made, and which therefore repel the supposition of the fact related being an after-thought or falsification. The suspicion of an opposite conduct may result either from the inherent nature and complexion of the evidence itself, or it may be indicated by the imputations actually thrown out in cross-examination or otherwise, by the opposite party. If a witness speaks to facts negating the existence of a contract, and insinuations are thrown out that he has a near connexion with the party on whose behalf he appears, that a change of market, or any other alteration of circumstances, has excited an inducement to recede from a deliberate engagement; the proof, by unsuspicious testimony, that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstances, and the testimony is placed upon the same level which it would have had if the motives for receding from a previous intention had never had existence. Upon accusations for rape, where the forbearing to mention the [*245] *circumstance for a considerable time is in itself a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection. See *East*, P. C. c. 10, s. 5."

THE LONDON ASSURANCE COMPANY *v.* SAINSBURY and Another. *June 28.*

An insurance office having paid the assured the amount of the loss sustained by him in consequence of a demolishing by rioters, sued the hundredors under the stat. 1 G. 1, st. 2, c. 5, s. 6, in their own names. Held, by Lord MANSFIELD and BULLER, J., WILLES and ASHURST, JJ., dissentient), that the office was not entitled to recover.

MR. LANGDALE's houses in Holborn, with his stock in trade, having been destroyed in the riots in June, 1780, he brought an action against Kennett and others, inhabitants of the city of London, on the riot act. The cause of *Langdale v. Kennett* was tried at Guildhall, before BULLER, J., on the 3d of March, 1781, and it appeared in evidence that Mr. Langdale's property had been in part insured, and particularly the London Assurance had paid him £1,689 14s. 8d., on account of an insurance on the stock in trade and utensils. Mr. Justice BULLER told the jury that they certainly ought not to deduct the amount of the insurances from the value of the houses and goods. The jury, however, brought in a verdict, in writing, as follows:—"We are agreed in giving Mr. Langdale a balance of £18,729 10s. 10d., in which we allow him on the buildings, rent, and stock in trade, in both houses and furniture. We have set off and deducted the amount of the duty remitted, and for the sundry insurances, and we give the balance left." In the following Easter Term a new trial was moved for on the part of the plaintiff, but the Court refused the rule, and it was generally understood.

that the insurers were entitled to bring an action on the statute in their own names.

The present action was brought in the same term (E. 21 Geo. 3). The declaration stated the insurance made by Langdale with the plaintiffs in 1763, setting forth the policy at length, and that all the conditions were complied with on the part of the insured. It then stated, that after the last day of July, 1715, and whilst the said insurance continued in force, viz., on the 7th of June, 1780, divers persons, to the number of twelve and more, demolished the said house and goods by fire to the value of £10,000, whereby the plaintiffs became liable and obliged to pay, and did then and there *pay to the said T. Langdale £1,689 14s. 8d., being their proportion [*246] of the loss; by reason of which premises the plaintiffs, by such demolishing and destroying by fire, the said goods, &c., were injured and damaged, &c., contrary to the statute, whereof the defendants, being inhabitants of London, &c., had notice.

The defendants pleaded, 1. The general issue; 2. That Thomas Langdale, after the last day of July, 1715, and before the exhibiting of the bill by the plaintiff, viz., in Michaelmas Term, 21 Geo. 3, impleaded B. Kennett, &c., inhabitants of London, on a plea of trespass in the case. [The declaration, plea, and issue, in that suit, were here set forth.] That a verdict was found against the said B. Kennett, &c., for £18,720 0s. 3d.; which said verdict still remains in force. And the said defendants aver, that the said T. Langdale mentioned in the present declaration, is the same person, &c., and the houses and goods mentioned in the present declaration are part of the houses and goods, &c., mentioned in the aforesaid declaration of the said T. Langdale against B. Kennett, &c., and for the same demolition of which, among other things, the said T. Langdale obtained the said verdict.

The plaintiffs replied, that before the said T. Langdale impleaded the said B. Kennett, &c., in the manner set forth, the said London Assurance did pay to the said T. Langdale the said sum of £1,689 14s. 8d., in the said declaration mentioned; and they further say, that at the trial of the issue in the said plea mentioned, it was given in evidence, on the part of the said B. Kennett, &c., that the said T. Langdale had received from the London Assurance the said £1,689 14s. 8d. on account of his damages sustained, &c.; and it was there insisted, for the said B. Kennett, &c., that the jury, in assessing the damages, ought to deduct from the damages sustained by the said T. Langdale, &c., the said sum of £1,689 14s. 8d.; and that the jury did deduct from the damages the said sum, and at the time of giving their verdict did declare to the said Court that they had made such deduction. And the said plaintiffs further said, that the damages sustained by the said T. Langdale did amount to the sum of £18,720 0s. 3d., over and above and exclusive of the said sum of £1,689 14s. 8d. so paid by the said plaintiffs.

Demurrer, and joinder in demurrer.

The case came on to be argued in Hilary Term.

**Davenport* for the demurrer.—It is admitted that the damage was [*247] sustained, and that it is not within any of the exceptions. The Court will not be troubled with any objections which have been overruled in a former case. A corporation cannot sue under the statute 1 Geo. 1,¹ nor will the Court strain a point in its favor. Corporations not named in acts of parliament are not included under the denomination of persons. A corpora-

¹ 1 G. 1, st. 2, c. 5, s. 6, which enacts, that if any church or chapel, &c., or any dwelling-house, &c., shall be demolished or pulled down, &c., the inhabitants of the hundred within which such damage shall be done, shall be liable to yield damages to the person or persons injured or damaged by such demolishing, &c.; and see the new statute 7 and 8 G. 4, c. 81, s. 2.

tion cannot be outlawed, excommunicated, or attainted, and cannot do fealty. Can it be said that corporations are within the Court of Conscience Act for London? 14 Geo. 2, c. 10. The acts of 2 Geo. 2, c. 25, and 7 Geo. 2, c. 22, against forgery, which mention persons, did not extend to corporations; and another act, 31 G. 2, c. 22, s. 78; 18 G. 3, c. 18 (see Harrison's case, 1777; 1 Leach, 180; 2 East, P. C. c. 19, s. 59, p. 988; 2 Russell on Crimes, 369, 2d ed.), was passed to subject persons to punishment for forgeries in corporations. The question then is, whether the word shall have a different meaning in a civil case and in a criminal one. In the one case persons are damnified, in the other they are defrauded. No objection will be made that the action is brought in the name of the insurer, because that question appears to be decided in *Mason v. Sainsbury*, ante, p. 61. [BULLER, J., said he did not understand that point to be concluded by anything that had passed in this Court; and Lord MANSFIELD said that the great question was, whether the insurer could recover otherwise than in the name of the insurer.] Certain persons may recover as trustees by the words of the act, as rectors, &c., for their churches. The only difficulty will be that the Court must say the jury did wrong in *Langdale v. Kennett*, in deducting the sum insured from the damages, and not suffering the plaintiff to recover as trustee for the insurers. If that question is open, the defendant must contend that no persons can recover as trustees but those who are described in the act. The legislature does not appear to have intended to comprehend insurers. If it had been mentioned, the answer would have been, "You may make an exception in your policy."

[*248] *Lord MANSFIELD desired *Baldwin* to take till Tuesday to consider the second point, on which he was not prepared. He said, as to the first point, this was a remedial law, and the strictness of construction adopted in some criminal cases, from a mistaken lenity, should not be extended to it. The question to be argued will be whether the insurer can maintain an action in his own name.

On Tuesday, the 4th of February, the case was accordingly argued by *Baldwin* for the plaintiffs, and *Davenport* for the defendants.

Baldwin for the plaintiffs.—The question directed by the Court to be argued is, whether an insurer, either an individual or a corporation, having paid the loss incurred by a demolition of the property, is entitled to recover under the statute 1 Geo. 1, st. 2, c. 5. It is material to consider the general principles applicable to the case. This is a remedial law; *Ratcliffe v. Eden*, B. R., M. 17 G. 3, Cowp. 485; *Hyde v. Cogan*, B. R., T. 21 G. 3, ante, vol. ii. p. 699; *Wilmot v. Horton*, C. B., cited ante, vol. ii. (n.), p. 702. The purposes of the act are, 1. To punish rioters; 2. To compel the hundred to suppress riots and to make compensation. The recompense is not given by the statute either to the owner or the occupier, or to any other person, by the description of his interest, but generally to the person damnified. The hundred are to pay a certain sum, and it is immaterial to them to whom it is paid. In *Mason v. Sainsbury*, ante, p. 61, the plaintiff recovered the whole amount of his loss, though insured as to part. Are not the present plaintiffs damnified? If they do not succeed, the hundred will be relieved from the sum the plaintiffs have paid. The Court will construe the statute liberally; and there are not wanting cases of an equitable interest conferring a right of action. In *Mason v. Sainsbury* it was admitted, that in the case of a ship being run down, the insurer might maintain an action in his own name. Suppose that a person is bound to repair a road, is it not good sense that he should have an action against a person who damages it? So a sheriff may have an action against a gaoler for an escape. But it is weakening the case to adduce examples. It rests on the act of parliament.

It is not the case of parties making a wager, but of persons doing an act beneficial to the *public, and sanctioned by the legislature. Mr. Langdale was not permitted to recover for this sum; and should it be [*249] held that the plaintiffs cannot recover in this action, and should Mr. Langdale refuse his name, they would be left without remedy.

Davenport, contra.—The question is, whether the act meant to include collateral and subdivided interests—whether every person having an interest to the amount of £20 shall harass the hundred with an action. Only one action is given by the statute; that action has been brought by Mr. Langdale, who has recovered in it all he was entitled to recover; and should the plaintiffs attempt to use his name, they would be barred by the recovery in a former action. Suppose that there should be a hundred insurers, shall there be as many actions with costs in each? In *Mason v. Sainsbury*, the whole amount was recovered by the person really interested. In this case they should, if they were dissatisfied with the verdict in Langdale's case, have taken the sense of the Court upon it. The sheriff, in the case of an escape, always sues in the name of the original plaintiff. He could not have a special action in his own name. Could the insurer, before the statute, have sued the trespasser? If not, the act makes no difference. Langdale properly brought his action for the whole loss, and no person can sue after him.

Baldwin, in reply.—If the hundred are injured by multiplicity of actions, they have only themselves to blame. It appears upon the record that they objected to the recovery of the whole in the name of Langdale.

Cur. adv. vult.

The Court not being agreed, the Judges now delivered their opinions *seriatim*.

BULLER, Justice (after stating the pleadings).—Such a plea and replication never were put on a record before, and I hope never will again. The result of the plea is, that the jury did not give enough. I am satisfied that they did wrong, and that I did wrong in admitting the evidence as to the insurance; but I directed the jury not to deduct, though they found contrary to that direction. In another cause I gave the same direction, and the jury found accordingly. The matter of a verdict is not traversable, and cannot be questioned in another action. It is not impeached here by any record, but by averment against the record, which can only be tried by matter *in pais*, by evidence of what the *jury thought. If they said nothing, [*250] could you try on what ground they went, or what demand or evidence they did not rely on? When the jury disclose the ground on which they went, in order to enable the party the better to have justice, the case must be the same. This does not resemble the case of confessing and avoiding a judgment, as that the promises are not the same, for there the judgment is admitted; there the question is tried by the proof of the evidence at the former trial, to show that the matter never was before a jury at all; but no proof is given of what the jury thought. Here the suit is not for a different cause of action, but for the burning of Langdale's house. If A. brings an action for a bale of goods, and recovers for twenty yards, shall he afterwards bring another action, and say, "I sold thirty yards?" He ought to have proved his whole case at first. To a plea of judgment recovered, what could he reply? Not that it is a different cause of action. Here it is admitted that the cause of action is the same; therefore, supposing that the plaintiffs could bring an action in their own names, which I deny, still the judgment in the former action would be a bar. But it does not appear whether there was a judgment. Both the plea and replication are bad, and I shall consider it as a demurrer to the declaration.

The question is, Whether the plaintiffs can maintain an action in their

own name? That depends upon another. Have they been injured? The property was in Langdale. The plaintiffs could neither take, sell, nor enjoy it. Can the destruction of it give them a property in it? If the insurance be a wager, then no action will lie; and I think that with respect to third persons it is a wager. In *Mason v. Sainsbury* it was held not to be an indemnity to the hundred. The hundred shall be neither benefitted nor prejudiced by it. A wager confers no interest, and yet the persons making the wager are affected by the event, and liable to pay. It is said, however, that this is not a wager, because it is a laudable act; but at common law a wager is as lawful as an insurance. I therefore hold that a wager between A. and B. will not give the wagerer an action against a third person.

But suppose it to be an indemnity. The insurer, it is said, stands in the place of the insured. But how? to use his name, subject to all his disadvantages. Suppose that the insured recovers a full satisfaction, it remains [*251] to be determined *that a verdict between different parties would bar the insurer, who was no party to it. That would require great consideration. It was held in *Mason v. Sainsbury* that the rules of strict law are to be applied to the hundred.

There is no convenience in maintaining this action; but is there no inconvenience? Suppose there are a hundred different insurers, there will be as many actions, and another by the insured, if he is short insured; and yet, according to *Mason v. Sainsbury*, he might recover the whole in one action. The Court ought to prevent multiplicity of suits.

Recourse has been had to an admission of counsel in *Mason v. Sainsbury*, that the insurer might recover in his own name for the running down of the ship; I deny it. Two decisions are mentioned in that case, which I will state: If the landlord has covenanted to indemnify his tenant against trespassers, and does accordingly indemnify him, still the action against the trespasser must be brought in the name of the tenant. Another case was admitted by the Court, that in escape, the whole debt having been recovered against the sheriff, still the action against the defendant must be in the plaintiff's name for the benefit of the sheriff.¹

A right of action cannot be transferred. Can the insurer bring an action immediately on the loss occurring? If he can, it must be a vested interest; if not, he cannot, by payment subsequent, which is his own act, entitle himself. I agree entirely with the judgment in *Mason v. Sainsbury*. This has been likened to the case of an escape against the sheriff, and the sheriff afterwards suing the gaoler who suffered the escape; there is, however, no such resemblance. The gaoler is the servant of the public; he is liable immediately on the escape: and besides, such actions are usually brought on the security given to the sheriff. I think there should be a judgment for the defendants.

ASHURST, Justice.—I am sorry to differ. This case is clearly within the words of the statute of George I., because the plaintiffs are injured. That [*252] statute is modelled after *the statute of Hue and Cry. There is no case in which a man may not maintain an action upon the case from a damage arising from the act of another. There may indeed be *damnum absque injuriâ*; but where there is an *injury*, I know of no exception to the rule. The practice of insuring is beneficial, and is countenanced by the legislature. *Mason v. Sainsbury* shows that the insurer is entitled either directly or obliquely to recover. Although a right of action cannot be transferred,

¹ But see *Sheriffs of Norwich v. Bradshaw*, B. R., H. 29 Eliz., Cro. Eliz. 53; *Salteston v. Payne*, B. R., T. 38 Eliz., Cro. Eliz. 285, 4 Bac. Ab. 899. If, indeed, the sheriff should sue in the name of the original plaintiff, the defendant can neither plead nor give in evidence the judgment obtained against the sheriff. Per *Abbott*, C. J., *Hunter v. King*, B. R., H. 1 & 2 G. 4, 4 B. & A. 210.

yet two persons may have a right of action for the same injury, *diverso intuitu*. On an agreement to build a house, which is destroyed before it is finished, I think the hundred would be liable to each party interested in proportion to his loss in separate actions. It is argued, that on payment the insured becomes a trustee, but he is not so until he brings his action, unless he stipulates to bring an action. It is not necessary that the injury and action should arise immediately on the act done. It arises from the subsequent acts. Can the owner, after being paid by the insured, recover against the trespasser? Certainly he can. So he may against the hundred; and when he recovers he is a trustee for the insurer. But the insurer may also bring an action in his own name, because when he has paid he is damaged. It has been said that the insurer has no remedy but in the name of another, who may release, and who only can be compelled in equity. That is so new a case that I cannot conceive that the law meant it here. The great difficulty is, that both the parties may bring actions at the same time, but there may be relief by *audita querela*. A fact is admitted by the demurrer which ought to stop the defendant's mouth. I see no objection to the averment, as the jury have told their reasons. I think that judgment should be for the plaintiffs.

WILLES, Justice.—It is admitted on all hands that the plaintiffs have received *damnum cum injuria*. I admit that a man cannot transfer his right to a chose in action; but if the insurer had an original right, he may elect to sue in his own name or in that of the insured. It is admitted that the verdict in *Langdale v. Kennett* was wrong; but the defendants could not move for a new trial in that cause, to which they were not parties. I do not feel the difference made between the injury at the time and on payment. They became liable immediately. This is not like a wager; it is an insurance on the house, and gives an interest in it. *A mortgagee might maintain an action under this statute. An insurer could not bring trespass [*253] for running down a ship, for want of possession, but perhaps he might maintain an action on the case. I think an action by the insured, as trustee, would be a bar to an action by the insurer. So a collusive release might be got over. I think judgment should be for the plaintiffs.

LORD MANSFIELD.—My leaning is strongly in favor of the plaintiffs, if the case will bear me out; for otherwise they must lose a sum of money for want of a remedy, and from the mistake of a jury in finding against the direction of the Judge. If, by law, either *Langdale* or the plaintiffs might sue, I have no doubt that it may be shown from what passed at the trial, that the sum sought to be recovered was not included in the damages, otherwise the plaintiffs might recover against *Langdale*, and show the verdict as conclusive evidence. I agree that the plea and replication are immaterial, and that the question is, whether this action could have been maintained in the name of the plaintiffs against the rioters if the statute had never been made? *Langdale* is the sole owner. The relation of the plaintiffs to the insurance, which is a contract of indemnity. It follows that in respect of salvage the insurer stands in the place of the insured, and *vice versa* as to damage. I take it to be a maxim, that as against the person sued the action cannot be transferred. As between the parties themselves, the law has long supported it for the benefit of commerce; but the assignee must sue in the name of the assignor; by which the defence is not varied. There is no instance of an action in the name of an insurer, while numberless actions have been brought by owners of ships for damage done by other ships, where many of them must have been insured. The case of a sheriff who has paid the whole debt is very strong, for he stands in the place of the debtor, by act of law; yet he must sue in the name of the plaintiff. Vide ante, p. 251, note A. If the

insurer could sue in his own name, no release by the insured would bar, nor would a verdict by him be a bar. It is impossible that the insured should transfer, and yet retain his right of action. Trustee and *cestui que trust* cannot both have a right of action. It is a great hardship, for which I cannot [*254] find a remedy; but it is better that the *general rule of law should prevail, that as against the person sued the right of action cannot be transferred, nor the defence varied. As we are equally divided, in order to expedite the bringing of a writ of error, let there be

Judgment for the defendant.

On Friday, the eleventh of February, 1785, this judgment was unanimously affirmed in the Court of Exchequer Chamber.

COOKSON v. FOSTER.¹ June 30.

Where the prisoner is supersedeable, he may be detained by the same plaintiff for another cause of action; but if in his affidavit the plaintiff includes the cause of action on which the defendant is supersedeable, the Court will discharge the defendant on filing common bail.

THE defendant was arrested in last Hilary vacation. The plaintiff did not declare in Easter Term, whereby (Hilary Term being reckoned as one²) the defendant became supersedeable. After a summons for a *supersedeas* had been taken out, a detainer was lodged against him by the plaintiff for another cause of action, which the plaintiff had no knowledge of at the time of the arrest. In the affidavit accompanying the detainer, the plaintiff had included the debt in the first action. *Cooper* having obtained a rule to show cause why the defendant should not be discharged on filing common bail,

Chambre showed cause, and cited *Olmius v. Delany*, B. R., M. 18 G. 2, 2 Str. 1216, and *Hutchins v. Kenrick*, B. R., T. 33 & 34 G. 3, 2 Burr. 1048.

WILLES, Justice,³ inclined that the defendant should be discharged.

BULLER, Justice, said, that there was no doubt that another plaintiff might lodge a detainer against a person supersedeable, and not superseded; that the same plaintiff might do so also, because he could not arrest him, being in [*255] gaol; and if he could not lodge a detainer against him, the *defendant would be out of the reach of all process, which could not be. A prison was not a protection, and there was no drawing any line but the being actually superseded.

But the plaintiff having included in the detainer the original debt, as to which the defendant was clearly supersedeable, the Court, on that ground, granted the rule without costs, *BULLER*, J., observing, that he knew of no case where the Court had obliged the defendant to give bail for a part of the sum in the affidavit.

Rule absolute.⁴

¹ S. C. cited *Tidd's Pr.* 175, 344, 360, 8th ed.

² See *Pullen v. White*, B. R., M. 4 G. 3, 8 Burr. 1448. The practice is now altered; and where a prisoner is taken or charged in custody, by mesne process, in K. B., the plaintiff may declare against him before the end of the next term after the return of the process by virtue whereof he was taken or charged in custody. R. H., 26 G. 3, *Tidd's Pr.* 345, 8th ed.

³ Lord MANSFIELD was absent.

⁴ [In general it is a rule not to go into the affidavit to hold to bail. Here it was necessary, in order to show that it was for a different cause of action; and being gone into, the reason for not holding to bail for a part ceases. But the plaintiff's conduct had been oppressive; the defendant had been detained for £800, when perhaps he might have found bail for £100.]—Note by Mr. Wilson.

BUSH v. LEAKE.¹ July 1.

Debt on bond, conditioned for the payment of £5000 at certain times, and performance of covenants in an indenture. Plea, stating the payment of the money at the times, and performance of the covenants. Replication, that the defendant did not pay the money *modo et forma*, and concluding to the country. Special demurrer, on the ground that the replication ought to have concluded with a verification. Held, that the conclusion to the country was good.

DEBT on bond. The defendant prayed *oyer* of the bond and condition, which were for the payment of £5000 and interest at the times therein mentioned, viz. £125, being half a year's interest, on the second of January, and £5125, being the principal and another half year's interest, on the second of July; and also for the performance of covenants in an indenture between the parties, of the same date. The defendant then set out the indenture, which contained covenants for the above payments, and several other covenants; and pleaded that he had paid the £125, according to the condition and indenture, and that he had paid the £5125, according, &c.; and also that he had performed all the covenants on his part to be performed contained in the said indenture; and this he is ready to verify. Replication, that the defendant hath not at any time paid the £5125, in manner and form, and concluded to the country. Demurrer, assigning for cause that the replication ought to have concluded with an averment.

**Gibbs*, for the defendant.—The plaintiff has selected one fact of the plea, and has concluded to the country. The principle is now [*256] incontrovertibly established, that in such case he ought to conclude with a verification. *Smith v. Dover*, B. R., T. 20 G. 3, ante, vol. ii. p. 428. Here the plea consists of several allegations, of which the plaintiff selects one. *Mulliner v. Wilkes*, ante, p. 218, decided last term, came as near as possible to the verge of the rule; for it is difficult to conceive how the issue there could have been proved without proving the corrupt agreement; and yet the conclusion to the country was held bad.

WILLES, Justice (stopping *Bower*, who was to have argued against the demurrer).—Here is an affirmative and a negative; and the material fact in dispute between the parties is in issue.

BULLER, Justice.—I adhere to the rule I laid down in the cases cited. But a part of it is omitted; it is when part is denied with a traverse. All the cases since I came into the Court have been on traverses. Here there is none, and could have been none. The cases are either where the defence consists of several distinct facts, making one point; or where it consists of several distinct points. In the first the replication denying one of the facts must conclude to the Court. In the other class of cases, where the defence consists of distinct points, as here, where the defendant is bound to do distinct acts, he must plead each of those acts separately, and it is not double. In such case the plaintiff cannot take a formal traverse. He may reply to each as if they were separate pleas; and denying the whole of one point, he must conclude to the country.

The plea of a right of common belongs to the class of cases where only one fact can be traversed. The other class of cases are where the plea contains several independent facts, as here, different conditions to be performed. It is enough to put the whole of one of these facts in issue. In such cases the defendant may plead separate facts, without his plea being double. Here there could be no formal traverse, because there could be no fact for inducement. Immaterial matter cannot be inserted by way of inducement. His Lordship cited two cases, of *Ash v. Walker*, B. R., 19 G. 3, cited ante, vol. i. p. 95, and *Coulthurst v. Coulthurst*, C. B., 12 G. 3.

¹ S. C. cited 2 T. R. 441.

[*257] **Gibbs* stated, and he was confirmed by *Law*, that in *Mulliner v. Wilkes* there was no formal traverse. *BULLER, J.*, said, that there was no *absque hoc*, &c.; but that there was a traverse by the words "and not." This also *Law* denied, and said that he had carefully avoided those words.] Judgment for the plaintiff.¹

¹ In a note to this case, *Mr. Wilson* observes, "The distinction seems to be, that when the plea contains a combination of dependent facts, one of which is denied, there must be a verification; but that when it contains separate independent facts, a denial of one should conclude to the country."—See the notes to *Mulliner v. Wilkes*, ante, p. 218.

ROBSON *v.* HYDE, Esq. July 1.

(Reported, CALDWELL, 810.)

FRENCH and Others, Assignees of COX, *v.* FENN.¹ July 1.

The defendant and one Cox purchased a string of pearls with money advanced by the defendant, and agreed that the profit and loss thereon should be equally divided, Cox paying his share of interest till the pearls were sold. Cox became bankrupt, being indebted at that time to the defendant. The pearls were afterwards sold, and the money was received by the defendant. In an action by the assignees of Cox for his share of the money received, it was held that the defendant was entitled to set off the debt due from Cox to himself, this being a case of mutual credit within the statute 5 G. 2, c. 80, s. 28.

THIS was an action for money had and received by the defendant to the use of the plaintiffs, as assignees. The defendant pleaded the general issue, and gave notice of set-off. The cause was tried before Lord MANSFIELD at Guildhall after last Hilary Term, and a verdict found for the plaintiffs, with £1008 14s. damages, subject to the opinion of the Court on the following case :

On the 24th of January, 1778, the bankrupt James Cox, the defendant, and Mr. John Halford, came to the following agreement: "London, 24th January, 1778. Purchased this day of Mr. John James Le Jeune a row of pearls, at the price of £2050, including his commission; the said sum being advanced by Thomas Fenn, Esq., with an agreement that the profit and loss thereon shall be equally divided between Mr. John Halford and James Cox, with the said Thomas Fenn, Esq., in thirds. We, the under-
[*258] signed, do hereby engage to pay two-thirds of the interest thereon *from the twenty-fourth of this instant January till the time that the said row of pearls is sold and the purchase-money reimbursed him. As witness our hands, John Halford, James Cox."

In November, 1778, a commission of bankrupt issued against the said James Cox, and afterwards the defendant sent the row of pearls to China, where it was sold for the sum of £6000 sterling; and after deducting for commission and some incidental charges, the net sum remitted to the defendant was £5722 10s.

The said James Cox was at the time of his bankruptcy indebted to the defendant in a much larger sum than the share of the profits of the said row of pearls now claimed by the plaintiffs, as his assignees, under the said agreement.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover.

¹ S. C. Cooke's Bankrupt Law, 565, 8th ed.

The case was argued in Easter Term last by *Davenport* for the plaintiffs, and *Baldwin* for the defendant.

Davenport.—The single question is, whose property this row of pearls was at the time of Cox's bankruptcy? for if it was the joint property of the three, then Cox's share vested in his assignees, and may be recovered by them in this action. But the defendant has given notice of, and claims a set-off. Whether that set-off can be allowed, must depend on the situation of things at the time of the bankruptcy. Now at the time of the bankruptcy the three parties were interested in the string of pearls, as in so much partnership property; and there was nothing like a debt due from Fenn to Cox. Put the case of a ship, the property of three joint owners, of whom one becomes bankrupt, the third of the ship vests in the assignees; and whenever the ship is afterwards sold, that share of the ship is liable only to the debts at the time of the bankruptcy, not to any specific claim of the person into whose hands it shall afterwards come. Suppose there had been three rows of pearls, all of equal value; here each of the owners would have had a right to one row. The assignees would have been entitled to one; and how could their claim be defeated by the subsequent sale of the pearls?

Baldwin, for the defendant.—The defendant had, originally, the whole property in the pearls; he paid for them, and the agreement between him and Cox was only for the profit and loss to be made on them. A court of equity *would, upon a bill being filed, give the defendant the benefit of a set-off. *Ex parte Deeze*, 1 Atk. 228. [BULLER, J.—Can you sup- [*259] port this on the statute of mutual debts? 5 G. 2, c. 30, s. 28. *Wilson* stated, that the case of *Deeze* was decided by the Chancellor on the ground of that statute, and not on the ground of lien. To this Lord MANSFIELD assented. BULLER, J.—Were there at any time mutual debts here? It seems to me that the bankrupt could never have called on the defendant for these pearls. *Baldwin*.—It is a continuation of the contract.]

The case having stood over for a further argument, it was now argued by *Lee*, S. G., for the plaintiffs, and by *Wilson* for the defendant.

Lee, for the plaintiffs.—It is meant to be contended on the other side, that the defendant, who had a prior demand to a larger amount, may avail himself of it as a set-off. There is no case in point on the subject. The cases of *Ex parte Prescott*, Canc. 1753, 1 Atk. 230, and *Ex parte Deeze* were meant to give a large extension to the statute 5 Geo. 2, c. 30; and it cannot be expected that the doctrines laid down in those cases, and which have since been acted upon, should be now overturned. But none of those cases go to the length of the present. Here there was nothing at all due from the defendant to Cox at the time of the bankruptcy, either in present or future. The debt was due from Cox to the defendant. The defendant had advanced the whole sum for the pearls. They were sent to China after the bankruptcy and the remittance of the proceeds did not take place till some years afterwards. The words of the statute, "that where there have been mutual debts between the bankrupt and any other person at any time before such person became bankrupt," will not admit of any debt or credit which was not mutual at the time of the bankruptcy. At that time there was an end of every prospect of debt which could be set off. If the defendant had gone, and desired the commissioner to take the account between himself and the bankrupt, it could not have been done. It was uncertain whether anything would ever be due. The act of Geo. 2 must be read on the other side: "Mutual debts between the bankrupt and any other person at any time before or after such person became bankrupt."

*Lord MANSFIELD (stopping *Wilson*).—Nothing can be plainer. The act was accurately drawn to include cases where the debt has [*260]

not arisen, but may arise in consequence of credit. Fenn gave Cox credit for advancing the purchase-money, and Cox gave credit to Fenn by trusting him with the pearls; and in consequence of having the pearls, Fenn gave Cox credit in other articles. He would not probably have done so but for the possession of the pearls. The justice of the case is also with the defendant.

WILLES, Justice.—The case of *Ex parte Deeze* is stronger than the present.

BULLER, Justice.—The argument for the defendant goes on the supposition that there is no distinction between mutual debts and mutual credits; but the statute, and all the cases in equity, show that there is such a distinction. It is true that here there was no cause of action till the pearls were sold; but then there were mutual credits before. As to Fenn proving his debt, there would have been no difficulty; he would have said, "I have no security but certain pearls, the profit upon which I claim to have in such a proportion." It is like the common case of a creditor having an additional security.

Postea to the defendant.

¹ See *Ex parte Ockendon*, 1 Atk 234; *Olive v. Smith*, C. B., T. 58 G. 3, 5 Taunt. 56; *Thomas v. Da Costa*, C. B., T. 58 G. 3, 8 Taunt. 345; 2 B. Moore, 386, S. C.; *Rose v. Hart*, C. B., T. 58 G. 3, 8 Taunt. 499; 2 B. Moore, 547, S. C.; *Sampson v. Burton*, C. B., T. 1 G. 4, 2 Bro. & Bing. 96; 4 B. Moore, 515, S. C.; *Easum v. Cato*, B. R., T. 3 G. 4, 5 B. & A. 861; 1 D. & R. 530, S. C.; *Key v. Flint*, C. B., M. 58 G. 3, 8 Taunt. 21; 1 B. Moore, 451, S. C.; *Ex parte Flint*, 1 Swanst. 30. The 5 G. 2, c. 30, s. 20, is re-enacted by 6 G. 4, c. 16, s. 50.

ATKINS et Al. v. DAVIS et Al. July 2.

(Reported, CALDECOTT, 315.)

The KING v. PETER WALDO, Esq. July 2.

(Reported, CALDECOTT, 358.)

[*261] *LORD PORCHESTER v. PETRIE.¹ July 3.

All judgments relate to the first day of the term; and the priority of one of two judgments signed on the same day cannot be averred.

A person discovering another person who is indemnified from the penalties of the stat. 2 Geo. 2, c. 24, is not a discoverer within the statute, nor indemnified.

THIS was a writ of *audita querela*, and the writ set out first the record in the action of *Petrie v. Lord Porchester*. The declaration in that cause stated, that on the second of September, 20 Geo. 3, a writ issued for an election at Cricklade; that on the fifth of September the sheriff issued his precept, and on the eleventh the election was had, when Benfield, Macpherson, and Petrie were candidates; and that Macpherson was the friend of Lord Porchester. Then followed one hundred counts for bribery by Lord Porchester, or his agent Bristow, of fifty different persons, all laid on the eleventh of September. The declaration was of Easter Term, 21 Geo. 3, and the cause was tried on the twenty-eighth of July, 1781, when a verdict was found for Petrie on ten of the counts. After this was stated the judgment for £5000

¹ S. C.; but not so fully reported, and without the arguments of counsel, 2 Saund. 148 b, n, 5th ed.; cited Tidd's Fr. 935 n, 9th ed. S. C. fully reported, Cricklade Election Case, p. 416.

and £215 costs. The *audita querela* then stated, that before the said election, viz., on the eleventh of September, one W. Hinton did corruptly ask the said Lord Porchester to give him, &c.; that after committing the said offence by the said W. Hinton, and after the committing of the said several offences by the said Lord Porchester, within twelve months after the election, viz., on the twenty-first of May, 1781, Lord Porchester discovered to Richards the offence of the said W. Hinton, &c., Lord Porchester not having been then convicted, &c.; that in Trinity Term, 21. Geo. 3, Richards impleaded Hinton; then followed the declaration against Hinton, containing four counts, for bribery, on the eleventh of September—the *postea*, twenty-eighth of July—verdict for Richards on one count for £500—the judgment against Hinton, which was Tuesday next after the morrow of All Souls, as was also the judgment in *Petrie v. Lord Porchester*; that the said judgment continued in force, as Lord P. was ready to verify; which said offence, whereof the said W. Hinton was convicted, was the same offence which Lord Porchester so *discovered. “And although the said Lord Porchester, [*262] by reason of the said discovery and conviction, is, and ought to be, indemnified and discharged from the said penalties and costs so recovered against him by the said Samuel Petrie, and the disability upon the said judgment; nevertheless the said S. Petrie unjustly threatens to sue out execution,” &c. The record then further stated that Lord Porchester sued out a supersedeas and process against Petrie, and the appearance; then Lord Porchester declared on the *audita querela*.

The defendant Petrie pleaded, that before the said election, viz., on the eleventh of September, Robert Hopkins, a voter, corruptly took and received, &c.; that after the committing of the said offence, and after the offence by Hinton, and before Lord Porchester made the discovery to Richards, viz., on the thirtieth of September, 1780, Hinton discovered to Petrie; that before Lord Porchester made the discovery to Richards, viz., on the twenty-first of May, 1781, Petrie sued out a writ against Hopkins, and in Trinity Term following declared against him. The plea then stated the proceedings in the action of *Petrie v. Hopkins*, in which the *Nisi Prius* day was also on the twenty-eighth of July, 1781, and the judgment Tuesday next after the morrow of All Souls, 22 Geo. 3; that the said judgment remains in force, &c., and that the said offence is the same offence, &c.; and the said Petrie avers that the said judgment so given against the said Robert Hopkins was, in fact, given before the said judgment was given, &c., against the said W. Hinton, in the said action so commenced against him by the said G. Richards, whereby Hinton was indemnified; and the said J. Petrie further saith, that the said W. Hinton, twelfth February, 22 Geo. 3, sued out a writ of *audita querela* against Richards, which is now depending. Verification.

To this plea Lord Porchester replied, that the judgment against Hinton, in the action by him against Richards, was given before the judgment against Hopkins, and traversed that the judgment against Hopkins was given before the judgment against Hinton; and this he is ready to verify.

Petrie rejoined, that the judgment against Hopkins was given before the judgment against Hinton and this Petrie prays may be inquired of by the country.

To this rejoinder Lord Porchester demurred, and assigned for cause, that it appears by the proceedings in this cause, *that the judgment [*263] against Hopkins and the judgment against Hinton were given at one and the same time, that is to say, on the same Tuesday after the morrow of All Souls, and therefore the averment that the judgment against Hopkins was given before the judgment against Hinton is wholly inadmissible, or if it were admissible, yet that the matter therein averred, being matter of record,

ought to have been verified by the record of the said judgment, and to have been determined by the Court here; whereas the said Petrie hath endeavored to put the same in issue to be tried by the country; and for that the said Petrie hath not offered to verify his plea, and the matter therein alleged by the record of the said judgment, or by any record whatever. The defendant joined in demurrer.

The case was argued in Hilary Term by *Baldwin* for the plaintiff, and by *Wood* for the defendant.

Baldwin, for the demurrer.—There are two objections in point of form assigned as causes of demurrer. 1. Matter has been put in issue to be tried by the country which is matter of record, and to be tried by the Court. It will be in the recollection of the Court, that several motions were made in these causes, and that all the rules were dismissed; the Court directing that judgment should be entered up in all the causes, in the same manner as if the motions had never been made; see the *Cricklade Case*, p. 410. Judgment was therefore, in fact, given at the time of that direction, and the accidental priority of one judgment will not be material. The Court did not mean that the parties should run a race for judgment. It is averred that judgment was given first, not signed first, in *Hinton's case*. This is no matter of fact. 2. The averment of one judgment being given before the other, is inadmissible as the record stands, for both are stated to have been on the same day. Every judgment, unless for some particular purpose, refers to the first day of the term. *Hutchinson v. Thomas*, B. R., T. 27 Car. 2, 2 Lev. 141; *Jackson, q. t., v. Gisling*.¹ The Courts have always avoided [*264] fractions of a day, to *prevent confusion, and have permitted them only for the purposes of justice. *Pye v. Cook*, B. R., T. 14 Jac. 1, Hob. 128, Moor, 864, S. C.; *Johnson v. Smith*, B. R., E. 33 G. 2, 2 Burr. 950; 1 Blackst. 207, S. C.

Having disposed of the special causes of demurrer, the substance of the plea is to be considered. The plea alleges that *Hinton* discovered to *Petrie*, who thereupon sued and obtained judgment, but that an *audita querela* is depending. There are two objections to this plea: 1. That by the defendant's own showing it appears that *Hinton's audita querela* is still depending, and that therefore it is uncertain whether he is liable or not; and secondly, that supposing the plea to be true, and that *Hinton* will succeed in his *audita querela*, still Lord *Porchester* is entitled to his exemption, under the clause in the act. The moment judgment was obtained, on Lord *Porchester's* discovery and information, his exemption was complete. Suppose that the king should pardon an offender, in a case where a reward is annexed to the conviction, the right of the informer would not be thereby divested. In all cases of rewards on convictions, the right attaches immediately in the verdict. In *Gunn's case*, tried at *Salisbury*, the defendant was permitted to give in evidence the record of a judgment against *Bristow*; and it was held sufficient, although *Bristow* was entitled to his *audita querela*, and on bringing it would be exempted.

Wood, contra.—The Court will dismiss from their memory everything that is not on the record. Lord *Porchester* ought to have taken the objection to the plea earlier. He cannot now take it, after having offered a traverse. [Lord *MANSFIELD* and *BULLER*, J., said, that as this was not matter of form the plaintiff might go back to the first fault.] The objection is matter of form, but, whether form or not, if the plaintiff offers an issue, he cannot afterwards avail himself of matter of law. To permit this would be

¹ B. P., T. 15 G. 2, 2 Str. 1169. These two cases were on informations on penal statutes. Plea, another information of the same term generally. On demurrer, judgment for the plaintiff, because the particular days ought to have been averred.

highly inconvenient. The objection is that the matter is triable by the record. Certainly matter of record must be tried by the record, but that is matter *contained in the record*. Here there is no dispute as to what is contained in the record. According to it, both the judgments are on the same day; the defendant does not deny this, but he alleges a priority on the same day. This fact cannot be tried by the record, for it does not appear on the record. A judgment given a *month later than another may stand first, for all judgments are entered as first brought in. The [*265] time of signing judgment is triable *in pais*, and not by the record. [Lord MANSFIELD.—The great question is, can you by law say they were of different days?] By law a man may be permitted to aver a material circumstance which does not contradict the record. The cases of *Hutchinson v. Thomas and Jackson v. Gisling* are strongly in favor of the defendant. In the first it was held that the defendant ought to have averred the particular days in the term when the informations were exhibited. This shows that, though in law the term is only one day, yet that an allegation may be admitted that an information was exhibited in the earlier part of the same legal day. The latter case is to the same effect. Both of these cases were cited in *Combe v. Pitt*, B. R., T. 3, G. 3, 3 Burr. 1423, where the principle of the decision was, that priority of time may be averred if it be material, and that although the law does not in general allow fractions of a day, yet it will allow fractions even of an hour where it is material to distinguish. In *Smallcombe v. Buckingham*, B. R., M. 9 W. 3, Salk. 320, which was an action against a sheriff who had received two *fi. fa.*'s on the same day, and executed the last first, the Court said that if two writs come to the sheriff the same day, he ought to execute that writ first which came to hand first, and that in such case there is a *prius* and a *posterius* in the same day. If this be the rule with regard to writs, why will it not hold with regard to judgments? There are no authorities to the contrary, and those already cited are in favor of the plea. In *Hynde's case*, B. R., T. 33 Eliz., 4 Rep. 70 b, it became material to ascertain the precise day of an enrolment, which appeared to be generally of the term. It was contended, that as it did not appear by the record what day of the term the deed was enrolled, but generally of Easter Term, it should be intended to be enrolled the first day of that term; and it was said, as in this case, that the effect and validity of the record would be tried by the country, which would be against the rule of law. But the Court held the averment good, and that it did not impugn anything apparent upon the record. They also held, that although the enrolment, or other matter of record, could not *be tried by the coun- [*266] try, yet that the time when the enrolment was made should be tried by the country. The time of receiving a writ or of signing a judgment is not matter of record, but matter extrinsic.

With regard to the substantial part of the plea, it is objected that an *audita querela* is stated to be brought by Hinton. It may be admitted that that alone would not be sufficient, but the facts are stated which entitle him to his indemnity. The mention of the *audita querela* is only introduced to show that he has not been guilty of any *laches*. The Court will not construe the statute verbally, but will give it substantial effect. It would be absurd that the discovery of an indemnified person should indemnify the discoverer. It is meant that the party indemnified should be the means of bringing somebody to justice. If it were otherwise, a discovery might as well be made by notice in the Gazette. Hinton's action was commenced before Lord Porchester's discovery, and he has also the priority of judgment. At the moment of judgment being given he was pardoned; but as no plea *pais darrien continuance* could be pleaded, judgment was entered against himself in form. But *nihil operatur*.

Lord MANSFIELD.—The great question is of much national importance, and has not been gone into. It is this—what completes the discovery, and to what time does it relate? If it can be said that the judgments are of different times, there is no way of trying that question but by the country. If not, there is nothing which a jury can try. It is an ancient and fundamental maxim, that judgments and acts of parliament are of the first day of the term or of the session. As to judgments, for the sake of a lien on land, an exception has been introduced by statute. A fiction shall not be contradicted in order to defeat the ends of that fiction, but it may be contradicted if its objects are not thereby destroyed. To comply with particular statutes these averments are admitted. This doctrine was much gone into in *Forster v. Bonner*, B. R., E. 16 G. 3, Cowp. 454, in which I took a good deal of pains.

The case stood for further argument, and in Easter Term (20th May) was argued by *Batt* for the plaintiff, and by *Bearcroft* for the defendant.

[*267] *Batt*, for the plaintiff.—By the established rules of law *no fractions of a day can be admitted, and in giving judgments the term is considered as one day. Whatever the reasons may be upon which the rule was originally founded, it is now well established, and is not to be disputed. Before the statute of frauds, even purchasers for a valuable consideration were concluded by judgments signed during the term, and relating to the first day. The Court, even in that hard case, could not dispense with the rule without a statute. As to judgment creditors the rule still holds. The relation of judgments appears from various cases. *Oder v. Woodward*, B. R., E. 1 Anne, 2 Lord Raym. 766, 849; Salk. 87, S. C., *Fuller v. Jocelyn*, B. R., M. 4 G. 2, 2 Str. 882, *Peters v. White*, B. R., M. 34 Car. 2, 2 Show. 288, *Chaney v. Needham*, B. R., M. 11 G. 2, Andr. 53; 2 Str. 1081, S. C., *Deakin v. Cartwright*, B. R., H. 12 G. 2, Andr. 308. It will be said, on the other side, that convenience requires that the rule should be departed from. The answer is, that no greater hardships can be imagined than occurred in the cases just cited. All acts of parliament relate to the first day of the session. 4 Inst. 25, *Panter v. Attorney-General*.¹ In Anderson's Reports, vol. i. p. 295, it is said that if clergy is taken from an offence by an act of parliament, a person guilty of the offence between the first day of the session and the passing of the act shall be deprived of his clergy. But it will perhaps be said on the other side, that it is not intended to deny the doctrine of relation, but that the object is to show priority on the day to which the judgments relate. The answer is, that no instance can be shown in which the Court has taken notice of a fraction of a day in the entry of judgments. The statute of frauds affords an argument against admitting such a doctrine, for it only directs the *day* of the judgment being signed to be marked, and takes no notice of the *hour*, or of priority on the same day. If such a doctrine should be established great inconvenience would be caused. It would be a race for judgment, and the swiftest legs or the longest arm would prevail. It would depend upon the personal agility of the attorney whether his client

[*268] should gain or lose £10,000. The cases which have been *cited on the other side are all distinguishable. Hynde's case related to the enrolment of deeds, which are required by law to be enrolled within a certain time, so that an inquiry into the time becomes material. In *Johnson v. Smith* the words of Lord MANSFIELD are in favor of the present plaintiff. "The reason why nobody shall be permitted to aver that a judgment was signed after the first day of the term, or that a *fi. fu.* was taken out in vaca-

¹ 6 Br. Parl. Ca. 553. But now, by statute 33 G. 3, c. 13, the operation of every statute is to commence from the time of its receiving the royal assent, unless some other period is appointed by the act.

tion, is, because the fact is not relevant. The legal consequences do not depend upon the truth of the fact on what day the judgment was completed, or the writ of *fi. fa.* actually taken out, but upon the rule of law that they shall be deemed complete, and bind, to all intents and purposes, by relation." 2 Burr. 967. In *Smallcombe v. Buckingham*, the question was upon an extrinsic fact, viz., the delivery of the writ to the sheriff. *Combe v. Pitt* was decided upon the priority of *action*.

With regard to the merits of Petrie's plea, the *audita querela* is still depending, and it is therefore doubtful whether Hinton will be indemnified.

But the most material question still remains to be discussed, whether, upon the fair construction of the statute, Lord Porchester is entitled to an indemnity. The statute, which is very penal, and ought not to be extended in its construction, says, that if any person offending against the act shall, within twelve months, discover any other person offending, so that such person so discovered be *thereupon convicted*, then, &c. The meaning of the word *convicted* appears from the cases of *Sutton v. Bishop*, B. R., H. 9 G. 3, 4 Burr. 2286, and *The King v. Mead*, B. R., T. 2 G. 3, 3 Burr. 1335. [Lord MANSFIELD.—In vulgar speech conviction means verdict, but in legal language there is no conviction before judgment.] The conviction and the punishment are distinct. Lord Porchester has obtained judgment against Hinton; Hinton is therefore *convicted*, and Lord Porchester is indemnified. But it is said that the discovery of a person who is himself indemnified, is not a discovery within the act. The discoverer cannot know whether the person whom he informs against is or is not indemnified. It is a transaction in its nature secret, and shall the informer, after having done all that lay in his power, be barred of his reward on account of a fact which he had no means of *knowing? It would be a breach of the promise made by the Legislature. Suppose an act of parliament holds out a reward [*269] for the discovery of an accomplice, and that the prisoner, after trial, breaks prison, shall the informer lose his reward? [Lord MANSFIELD.—That will depend upon the construction of the act of parliament or proclamation.] There is no case precisely in point, but the case of the approver mentioned in 3 Inst. 130, approaches the nearest.

Bearcroft, contra.—There are two principal questions on this record: 1. On the construction of the statute; and, 2. On the rule as to the relation of judgments. Lord Porchester is the actor, and comes forward to pray of the Court to bar Mr. Petrie of his execution on the judgment he has obtained against him. Lord Porchester's case is this: he says, "It is true, Mr. Petrie has recovered four judgments against me; yet he ought to be barred, because I am a person entitled to an indemnity on the true construction of the act; and the grounds of my indemnity are, that one Hinton has been proceeded against on my discovery, and was prosecuted to conviction before I was." To this Mr. Petrie answers, "All that you allege may be true, but Hinton is himself an indemnified man, by having discovered Hopkins before you made the discovery of Hinton's bribery; and the judgment against Hopkins was prior to the judgment against Hinton." The statute requires that some person who has been guilty of bribery should be punished. The discoverer is indemnified and discharged from all penalties and disabilities; but it is clear that the statute only intended that he should be discharged in case he substituted some other offender in his place to bear those penalties and disabilities. But if Hinton was indemnified, no such person was substituted. Unless this be the true construction of the act, out of the three persons who have offended against the law, only one would be punished. Lord Porchester and Hinton would escape, and Hopkins alone would be punished.

Upon the second question the defendant contends that he was entitled to

aver priority of judgment by the fraction of a day. No reason has been assigned for the rule which directs the relation of judgments. Whenever good sense and the policy of law requires that rule to be dispensed with, it must yield. *In fictione juris consistit æquitas*. It is true that an averment that a writ issued in vacation will be bad for the purpose of destroying the [*270] writ; but whenever *equity and good sense require that the time of commencing the action should be ascertained from the issuing of the writ, such an inquiry is allowed, as was settled in *Johnson v. Smith*, which was a very elaborate judgment. It is true that it was the case of a writ; but a writ is a record as well as a judgment. All the arguments in *Hynde's case* apply here. It was an enrolment; but the operation of an enrolment arises out of the circumstance of its being a record.¹ In *Swann v. Broome*, B. R., M. 5 G. 3, 3 Burr. 1595, the Court would not permit a judgment to relate to the first day of term, because it could not be prior to the return. [Lord MANSFIELD.—The rule laid down in that case was, that a judgment relates to the essoin day of the term, unless anything appears upon the record to the contrary, showing that the judgment cannot have that relation.] It is not necessary to ask the Court to violate the rule of relation to the first day of term. The defendant only wishes to have his priority on that day recognised. The two judgments could not have proceeded *uno statu*, whether pronounced by the Court or written by the officers. The statute of frauds, it is true, only requires the day to be marked, but the register act for Middlesex directs the hour to be noted.*

But there is another relation to be attended to—the relation of the discovery from the time of judgment, which carries the indemnity back to the time of discovery. Hinton then had an inchoate indemnity, and the discoverer runs the risk of the person discovered being indemnified.

Lord MANSFIELD.—The general question is, whether Lord Porchester has convicted any one, not having been before convicted himself? If the fraction of a day can be gone into, then Hinton has a judgment prior to Lord Porchester's. If the question of the fraction of a day cannot be gone into, Hinton is still an indemnified person, and it comes to this—Is the discovery of an indemnified person sufficient?

As to the fraction of a day, fictions are instituted for general utility and the furtherance of justice. The ground of the rule, that there shall be no priority of judgment, was to prevent all confusion, and all races for preference. [*271] No fiction is allowed to be questioned for the purpose of overturning *the ground for which it was introduced. For collateral purposes it may. Thus, the actual period of the commencement of a suit may be shown where a question arises on the statute of limitations, but not for other purposes. The suing out the writ is the commencement for one purpose, the filing of the bill for another. We will consider of the general question, whether the discovery of an indemnified person is a discovery within the statute.

WILLES, Justice.—My doubt is, whether, if the judgments be all at the same instant, Hinton can be an indemnified person at the time of Lord Porchester's judgment. To hold so seems to give him a priority, and to imply that his judgment against Hopkins was prior. *Curia adv. vult*.

On this day the judgment of the Court was delivered by

Lord MANSFIELD.—This is an *audita querela*, brought by Lord Porchester, to be relieved from the effect of a judgment obtained against him by the defendant Petrie for bribery. The writ and declaration state, that Petrie, in

¹ As to an enrolment of a deed being a record, see *Wymark's case*, B. R., M. 35 & 36, El. 5 Rep. 74 b.; 2 Roll. 119, 120; *Gilb. Ev.* 22; *Com. Dig. Barg. & Sale* (B. 10).

*The day, hour, and time, 7 Anne, c. 20, s. 6.

Easter Term, 21 Geo. 3, brought an action against Lord Porchester for bribery, which was tried in July, 1781, and judgment given for the plaintiff on the first day of Michaelmas Term, 1781. That, on the 11th of September, 1780, Hinton was guilty of bribery, and on the 29th of May, 1781, Lord Porchester made a discovery of it; on which discovery an action was brought by Richards against Hinton; and that cause was also tried in July, 1781, and there was judgment for the plaintiff on the first day of Michaelmas Term, 1781; for which reason Lord Porchester insists that he is exempt from the penalty recovered against him by Petrie.

The plea states that one Hopkins was also guilty of bribery; and before the discovery of Hinton made by Lord Porchester, to wit, on the 20th of September, 1780, Hinton discovered Hopkins; on which discovery Petrie, in 1781, brought an action against Hopkins, and that action was also tried in July, 1781, and judgment was given for the plaintiff on the first day of Michaelmas Term, 1781. The plea then avers that the judgment against Hopkins was given before the judgment against Hinton, and that Hinton had sued out an *audita querela* against Richards, which is still depending.

The replication traverses that the judgment against Hopkins was given first.

The rejoinder takes issue on the traverse.

*To the rejoinder the plaintiff demurs, and assigns for cause, that [272] it appears by the proceedings in this case that the judgment against Hopkins and the judgment against Hinton are both given at the same time, and therefore the averment of the priority is not admissible; and that being a matter upon the record, it ought to be tried by the record, and not by the country.

Upon this record four points have been made in argument. The first three on the pleadings, and the last on the construction of the statute 2 Geo. 2, c. 24.

1. Whether the priority of one judgment over another can be averred, when it is admitted on the record that both judgments were given on the same day.

2. Supposing that such an averment can be made, whether it is a fact that can be tried by the country.

3. Supposing that the question ought to be tried by the record, whether the plaintiff, having in his replication traversed the priority of the judgment, shall be admitted to take an objection to his own traverse.

4. Whether, admitting the judgment obtained by a discoverer to be an indemnity, though of the same day with the judgment against him, a conviction of a person indemnified be an exemption within the statute.

As to the first point. It is laid down in *Johnson v. Smith*, that judgments shall be complete, and shall bind, to all intents and purposes, by relation. This is the rule of the common law, and no authority can be found to contradict it. In *Stanford v. Cooper*, B. R., H. 3 Car. 1, Cro. Car. 102, a *sci. fa.* was brought on a judgment in debt obtained in Hilary Term; the defendant pleaded a statute acknowledged the 22d of January, and on demurrer it was adjudged that the judgment related to the *essoin* day. That was a very strong case, for the statute was acknowledged on the day before the first day of the term, and the Court, which is bound to take notice of its own proceedings, must know and see that the judgment could not be given till the 23d of January, and, consequently, was subsequent to the statute. They held, however, that the legal fiction and relation should prevail against the truth and fact of the case. In *Gerrard v. Norris*, Latch, 53, the plaintiff was in under an *elegit*, the judgment being given, Crastin v. Trin, which was the 20th of June. The defendant claimed by virtue of an extent under *a* [273] statute of the same term, but earlier, viz. the 20th of June. The reporter

adds, he heard that it was adjudged that the plaintiff had the better right, because he claimed to be in under a judgment, and all the term is only one day in law. In that case the attempt was to make a fraction of a day; and the defendant pleaded that his statute was before the judgment, but the Court would not allow it. In *Miller v. Bradley*, B. R., M. 10 G. 1, 8 Mod. 189, the defendant moved to have the execution set aside, because the judgment on which it was taken out was not really a judgment till the morrow of the Holy Trinity, and so was not sufficient to warrant the issuing of the execution; but the Court said that it was a judgment of the first day of the term in which it was obtained, by relation. It must, from the argument, have been sworn that the judgment was not in truth and in fact given till the morrow of the Holy Trinity; but the Court held, that though the fact appeared, the legal relation must prevail.

The cases which have been cited—of *Pye v. Cook*, ante, p. 264; *Hutchinson v. Thomas*, ante, p. 263; *Jackson v. Gisling*, ante, p. 263, and *Combe v. Pitt*, ante, p. 265—are not applicable. The priority of judgment was not the point in any of them. The question in all of them was the priority of the commencement of the suit, which is the act of the party, while the judgment is the act of the Court. These cases are founded on statutes by which a penalty is given to the party who shall first sue, and on that ground it was determined that the suit first commenced might be pleaded in bar to the others.

There is another string of cases as little apposite: *Johnson v. Smith*, ante, p. 264; *Wood v. Newton*, B. R., M. 20 G. 3, 1 Wils. 141; *Forster v. Bonner*, B. R., E. 16 G. 3, Cowp. 454. All these cases arise on questions concerning the commencement of the suit, whether the *latitat* or the bill is the commencement; and the result of them is, that the bill is, in point of law, the commencement; but that the plaintiff may, by specially stating it, make the *latitat* the commencement; and the true time, if material, may be inquired into and shown. The application for the writ, and suing it out, are [*274] the acts of the party, and as such may be put in issue. But this general rule of law, like most others, is subject to exceptions. I will mention two, which comprehend all the cases in any degree applicable to the present.

The first exception is where the precise time of signing a judgment, or of doing any other act of record, is made material by statute, as in the case of a bargain and sale enrolled, which must be within six months after execution; or as in the case of a judgment, between purchasers, where, by positive statute, the time of signing the judgment must be marked on the roll, and the judgment shall bind from that time only. *Hynde's case* was determined on the statute. But the exception arising out of positive statute law proves the rule of the common law, for it was that rule alone which made the statute necessary in cases in which the legislature thought an exception from the general rule of law ought to be made.

The second exception arises at common law, where there is a special memorandum, before the bill, of a particular day. In such case, as it appears upon the record when the bill was filed, and as judgment could not be given before the bill was filed, the judgment can only have relation to the time of the filing of the bill. This appears to be the foundation of the judgment in *Hays v. Wright*, B. R., E. 1 Jac. 1, Yelv. 35. The first reason given by the Court in that case cannot be supported, for if the award was void there could be no cause of action. The second reason is the only one on which the judgment can be supported. It is there allowed that, in point of law, every judgment relates to the first day of term; but the Court thought it was admitted on that record that the former judgment was given after the 20th of April.

So, in the case of *Miller v. Bradley*, the Court held, that if it appeared by continuances that it was not a judgment till a particular day in the term, it should not relate to the first day of the term. It appears also from 3 Salkeld, 212, that judgment shall relate to the first day of the term as much as if it had been given on that very day, unless there is a memorandum to the contrary, and continuances till another day. For these reasons we are of opinion that it is not competent to aver the priority of one judgment before another in a case where both judgments are given on the same day.

This opinion makes it unnecessary to consider the two *other objections which have been argued on the plea; but whenever it becomes necessary to decide on the mode of trying the priority, the same cases and the same reasons will go a great way to show that it ought to be by the record, and not by the country. [*275]

The only remaining question is, whether, taking it for granted that, in general cases, a discovery by the defendant, at the same time that a judgment is obtained against him, will exempt him, such discovery will be sufficient, whether the person discovered is himself exempted from all penalties in consequence of another conviction obtained on a discovery made by him.

This is quite a new question, and therefore, to make the matter as intelligible as I can, I will again state, from the record, so much of the case as is applicable to this point, and the arguments which have been used by Lord Porchester's counsel. The facts stated in the plea and admitted on the record are, that Lord Porchester discovered Hinton, and Hinton discovered Hopkins; upon which discovery an action was brought, and a verdict and judgment obtained at the same time that a verdict and judgment were obtained against Hinton: that Hinton sued out an *audita querela* on the judgment obtained against him, which *audita querela* is still depending.

Lord Porchester's counsel have urged two different arguments to prove that the judgment obtained on the discovery of Hinton against Hopkins shall not prevent Lord Porchester from enjoying the exemption to which he would otherwise be entitled: first, because the *audita querela* brought by Hinton is still depending, and, till determined, *non constat* whether Hinton will be exempt or not; and that though the plea, besides stating the *audita querela* depending, has immediately stated the fact upon which it is contended that by law Hinton is exempt, yet the Court ought not to decide upon the fact respecting Hinton on this record, as he is not a party to it. As to the *audita querela* being still depending, that fact is alleged only to show that Hinton is pursuing his remedy, if, on the facts stated, he is entitled to any, and it is not contended that the mere pendency of it can affect Lord Porchester; but all the facts which entitle Hinton to an indemnity are precisely stated on the record, and are, for the reasons I have given in *discussing the [*276] fourth question, sufficient to entitle Hinton to his indemnity.

The only part of this objection that remains to be considered is, whether the court can decide upon this fact, since Hinton is not a party. It would be very unequal justice if it could not. Both parties to this record are interested in the event—the legality of the judgment against Hinton. Lord Porchester insists that he has a right to avail himself of it, and relies upon it as his indemnity. Justice demands that Petrie should allege any reasons he can to show that such judgment is ill founded, or of no avail. He can only do so by stating the objection in the manner he has done, for he could neither maintain an *audita querela* nor a writ of error. A judgment is conclusively binding upon those only who are parties: all others have a right to dispute the justice, propriety, and fairness of it, when it becomes material to them to do so. Suppose that Hinton, notwithstanding his title to an indemnity, chose to submit and to pay his £500, for the sake of saving as many

thousands, to Lord Porchester, and therefore brought no *audita querela*—it is impossible that such a judgment could conclude Petrie, who was no party to it.

The second ground of argument on behalf of Lord Porchester was, that admitting Hinton should hereafter be relieved, or had now been relieved, still Lord Porchester would be entitled to an indemnity because he had prosecuted Hinton to conviction; and it was said that this resembled the case of an indemnity given on a conviction which has been followed by the king's pardon. The case of a conviction upon an indictment and subsequent pardon does not warrant the argument, but the reason applies strongly the other way. In criminal proceedings the verdict is the conviction, and it remains a conviction notwithstanding the effect of it is done away by a pardon. The party who procures such a conviction has performed the condition on which he obtains his indemnity, and the subsequent conduct of the Crown cannot divest the right of the party. But even there it must be a legal conviction, and capable of being carried into execution, or the discoverer is not *strictly* entitled to his indemnity. Thus, if the prisoner is tried on an insufficient indictment, and, judgment being arrested, is indicted again, the accomplice is bound to appear [277] as a witness on the second trial, or *he will not be entitled to his pardon. So, in this case, the conviction must be legal and sufficient; but in a civil proceeding the conviction can only be on judgment.

This brings it to the question, whether the judgment against Hinton, he being indemnified, is such a conviction as entitles Lord Porchester to an indemnity. That question in reality amounts to this, Whether a conviction to entitle a person to an indemnity must be such a conviction as may be followed by execution and by punishment, or whether it be sufficient if it be a conviction in form only. The very statement of the proposition decides it. There is no case of a conviction on an insufficient indictment, and the reason assigned in *Sutton v. Bishop* proves that point beyond all contradiction; for Mr. Justice YATES lays it down, that the plain intention of this clause is to substitute another offender in the place of the party discovering, so as to subject him to all the penal consequences of the offence. But Lord Porchester has not substituted any other offender in his place who can be the object of punishment. Hinton is not liable to any of the penalties or disabilities of the act; and therefore, if such discovery were allowed to exempt Lord Porchester, no example could be made, and the law would be rendered of no effect.

It has been contended that Lord Porchester has the merit of discovering so far as it was in his own power; and that as the punishment or the escape of the offender does not rest with him, he ought not to suffer for that which it is out of his power to accomplish. The answer is, that whatever may have been the intention of Lord Porchester, he has not done that which he undertook to do—he has not brought another offender to punishment. It is upon the performance of that act, and not upon the intention of the party, that the legislature has made the indemnity depend. We are therefore of opinion that there must be Judgment for the defendant.¹

¹ The doctrine of the relation of judgments to the first day of the term has been recognized and acted upon in a variety of cases. *Bragner v. Langmead*, B. R., M. 87 G. 3, 7 T. R. 20; *Ex parte Birch*, B. R., M. 6 G. 4, 4 B. & C. 880; *Greenway v. Fisher*, B. R., M. 8 G. 4, 7 B. & C. 486, 1 M. & R. 380, S. C.; *Calvert v. Tomlin*, C. B., T. 9 G. 4, 5 Bingh. 1, 2 M. & P. 1 S. C.: see also *Roe v. Hersey*, C. B., M. 12 G. 3, 3 Wils. 275.

Judgments have relation to the *essoign* day of the term, which, for this purpose, is considered the first day of the term; *Bolton v. Eyles*, C. B., E. 1 G. 4, 2 B. & B. 51. In the matter of *Burt*, B. R., T. 7 G. 4, 5 B. & C. 668; *Laidler v. Elliott*, B. R., E. 5 & 6 G. 4, 3 B. & C. 748; *Whittaker v. Whittaker*, B. R., M. 9 G. 4, 8 B. & C. 768.

*Upon this judgment Lord Porchester appealed to the House of Lords, but the writ of error was subsequently withdrawn, and, on the 17th of July, 1783, Mr. Petrie *executed releases to Lord Porchester, and powers of attorney to enter satisfaction upon the record. [*278] [*279]

But it is said, that in actions by bill, the judgment relates only to the first day of full term. Per BULLER, J.; *Richards v. Hinton*, B. R., E. 22 G. 3; and see 2 T. R. 576, Tidd's Pr. 976 (n), 8th ed.

The rule, that (except for the purposes of the statute of frauds) judgments must have relation to the first day of term in all cases, was fully recognised in *Greenway v. Fisher*, B. R., M. 8 G 4, 7 B. & C. 486, 1 M. & R. 330, S. C. "At common law, judgments related to the first day of the term in which they were entered up, in like manner as all acts of parliament related to the first day of the session in which they were passed. I take one reason of this to have been that there was not any mode of ascertaining the precise time at which judgments were signed. By the statute of frauds this rule of law was altered for one purpose, and now the Court can for that purpose ascertain and notice the time when judgments are actually signed. So, if, by the words of an act of parliament, the commencement of its operation is confined to a particular day, that may be noticed by the Court. But, with the exception of those instances, the old rule of relation still prevails." Per Lord TENNENT, *ibid.* In the case of *Bennett v. Isaac*, Scacc. E. 8 G. 4, 10 Price, 154, the Court of Exchequer appear to have considered the rule less strictly. "A judgment of the vacation being considered as referring to the first day of the term is merely a fiction of law; and it may have many good effects, as the rendering a search more easy; but that fiction must not be suffered to work an injustice, and that is an established maxim of the law. The Court, to prevent its operating injuriously, may, and frequently do, inquire of the fact of the actual day on which judgment was entered up, as for the purpose of ascertaining whether the case is within the statute of limitations, and on other occasions of the like nature. By inspection of the record we find that an imparlance was granted till the 23d of January; and from the marginal note we learn the precise day on which judgment was actually signed; and the marginal note is part of the record, and it is made so for the express purpose of preventing injustice in consequence of the legal fiction." Per GRAHAM, B., *ibid.* 165. "With respect to the fiction under which these judgments are nominally considered of the first day of the term in which they bear *teste*, I think that we may notice judicially that fiction, and correct it by the fact where it may become necessary to the justice of the case that we should do so. For instance, we may take notice that the judgment in this very case was in fact recovered in that part of the term which was in the second year of the reign of the king; and if an issue, taken on that allegation of *nul tiel record*, had been tried before me, I should have held the allegation well proved by this record; for I should have considered myself at liberty at least, if not bound, to take notice of the fact, when it was necessary to obviate any mischief that might arise from the fiction." Per Wood, B. *ibid.* p. 168.

The extraordinary legal proceedings, arising out of the Cricklade election, of which the *audita querela* reported in the text was the termination, are fully reported in the "Report of the Cricklade case," &c. London, Payne, 1785, and occupy five hundred pages. One hundred and thirteen actions were commenced by Mr. Petrie upon the statute of George II., the records in which were carried down to Salisbury: of these one hundred and five were tried, and, in eighty-three, verdicts were found for the plaintiff, amounting in the whole to £41,500. In some of these actions various applications were made to the Court of King's Bench, which will be found fully reported in the Cricklade case, but which are omitted in the present volume, as the principal points discussed in them were entered into more at large on the argument of the *audita querela*.

In the case of *Benfield v. Petrie* (Cricklade case, p. 295), tried at the Salisbury Lent Assizes, 1782, Mr. Burke, the brother of Edmund Burke, appeared for the plaintiff, with Mr. Pitt as his junior.

MORRIS v. SMITH. July 3.

Covenant on a coal lease to pay a certain proportion of the value of nine hundred-weight of the coals to be raised, unless prevented by unavoidable accident from working the pit. Plea, that the defendant was prevented by unavoidable accident. It appeared in evidence that the accident might have been remedied at a greater expense than the value of the coals to be raised. Held, that the plaintiff was entitled to recover.

THIS was an action of covenant on an indenture of lease of a piece of land for the purpose of sinking coal-pits. Various breaches were assigned, but the material one was, that the defendant, who was assignee of the lease, ought to pay to the plaintiff a certain proportion of the value of nine hundred-weight of coals to be raised, unless prevented by unavoidable accident from working the pit. The plea to this breach was, that the defendant was prevented by unavoidable accident, to wit, by large quantities of water unavoidably coming in and overflowing the coal-mine, and unavoidably continuing and remaining therein: on which issue was joined. The cause was tried before BULLER, J., at the sittings for Middlesex, in this [*280] term; when it appeared *that, after working the mine for some time, great quantities of water came in by faults in the mine, notwithstanding which the stipulated quantity of coals might have been got, but at a greater expense than they could possibly repay. The words in the exception were "merchantable coal." BULLER, J., said, that the defence was certainly not within the words of the exception, but desired the jury to find the facts specially. The jury, however, found for the plaintiff generally. A rule for a new trial having been obtained,

Bearcroft and *Wood* showed cause.—"Merchantable coal" means that the coal when got should be of such a quality as to be saleable. The term has no relation to the expense or profit of getting. [To this Lord MANSFIELD assented.] Is it the meaning of the covenant that the lessee shall have a profitable bargain? Is he to be excused as soon as it becomes a losing bargain? But on these pleadings that question cannot arise. The plea says that the water unavoidably continued and remained in the pit, but the jury have found that it might have been removed. It is immaterial at what expense that removal might be effected.

Lee, S. G., and *Baldwin*, contra.—The covenant must receive a reasonable interpretation, according to the intent of the parties; but it never could have been their intention that the water should be removed at all events, and at whatever expense. Could it have been intended that the lessee should continue to raise coals at this expense for forty-five years, and thus entirely ruin himself? The accident was unavoidable by those means which a person working the mine for his own benefit would use. It could only be avoided at an expense which rendered the profitable working of the mines impossible. The covenant merely meant to guard against the wilful negligence or misfeasance of the lessee, and could never have been intended to embrace a case like the present. [*Baldwin*, on the part of the plaintiff, here offered to accept a surrender of the lease.]

Lord MANSFIELD.—The offer to take a surrender of the lease, and the refusal on the part of the defendant, go a great way towards explaining the real nature of this case, and the intention of the parties. This brings us to the consideration of the covenant. The lessor is to receive a rent in proportion to the coals raised, and therefore it becomes necessary to stipulate that a certain quantity shall be raised. But they are not to be raised in [*281] case of unavoidable *accident. Unavoidable accident means an accident physically unavoidable. An interruption for some months will not discharge the lessee. All coal-pits are subject to such accidents. Upon these pleadings the profit does not come in question.

WILLES, Justice.—I am of the same opinion.

BULLER, Justice.—I am clearly of opinion that the deed will not bear the construction contended for by the defendant, which appears to have been an after-thought subsequent to the pleadings being drawn. In my opinion the verdict is right.

Rule discharged.

TAMM, Widow, and Another, v. WILLIAMS and Another.¹ July 4.

In a plea of foreign attachment it must be stated that the garnishee resided within the jurisdiction of the mayor's court.

Quere, Whether it is necessary to aver that the defendant below had notice, and that the plaintiff above was indebted to the plaintiff below.

THIS was an action for goods sold and delivered, and the declaration contained the common counts. The defendants, as to all but £79 0s. 9d., pleaded the general issue; and as to £79 0s. 9d., they pleaded the custom of foreign attachment in London, which is set out as follows:

That if any person be or hath been indebted to any other person, within the said city, in any sum of money, and for the recovery thereof such person affirm or hath affirmed a bill in original in debt in this court, &c. (setting out the bill); and if the sergeant-at-mace return that such defendant in the bill original hath or had nothing within the liberties of the said city by which or whereby he can be summoned, nor is nor was to be found within the same city; and such defendant at court being solemnly called doth not appear, or hath not appeared, but makes or hath made default; and in the same court it be or hath been testified or notified to the same court by the plaintiffs in the said original bill that any other person (Amendment: "Within the said city,") be or hath been indebted to any such defendant, in any sum of money amounting to the sum of the debt in such bill of original specified, or any part thereof; then, at the petition of the said plaintiff, it is commanded to attach the defendant by such sum of money; and if the sergeant return him to be attached, and if the defendant at four courts make default, it is usual for the court to command a sergeant-at-mace *to [*282] warn such other person, according to the custom of the said city, to be and appear, &c., to show if anything he hath or knows of to say for himself why such plaintiff in such bill original named ought not to have execution of such sum so attached as aforesaid: and if the sergeant return such other person to be warned, and if such person make default, it hath been used and accustomed to award, and for such plaintiff to have execution, &c., by sufficient pledges to be found and given by such plaintiff, &c., to restore to such defendant such sum of money so attached, if such defendant within a year and a day from thence next ensuing come, or hath come, into the said court so holden as aforesaid, and disproves, or hath disproved or avoided, the said debt, &c.; and that after such pledges found and execution had, such other person hath been discharged against such defendant of the said sum so attached, and such defendant discharged against such plaintiff of such money of his debt in such bill originally demanded by such plaintiff so long as such judgment and execution remain in force and effect; and if such sum does not amount to the whole sum demanded by the plaintiff's bill, such plaintiff hath been used to pray process for the residue of his said debt. [It was not stated to be usual for the plaintiff to make oath of his debt before execution awarded.] The plea then averred, that the customs of London were confirmed by statute 7 Ric. II.; that Thomas Garner and Joseph Ashmore, of London, merchants, affirmed a bill original against the plaintiffs for £600, and stated such proceedings to have been had as are above described, particularly that the Court ordered the plaintiffs to be attached by the £79 0s. 9d. due to them by the defendants, and the sergeant-at-mace returned them attached by the said £79 0s. 9d. in the hands and custody of the said defendants (amendment: "Within the said city,") and the command to warn the

¹ S. B. 2 Chitty Rep. 488; but without the second argument.

defendants, and the sergeants return that they were warned (amendment: "The said B. and T., who were then within the said city.") The plea then stated the pledges found and execution, and averred the judgment and execution to remain in full force.

The defendants were nowhere described of, nor averred to be in, the city. [283] The plaintiffs demurred to this plea, and assigned for *cause that it amounted to the general issue. Joinder in demurrer.

In T. 22 Geo. 3, the case was argued by *Dayrel* for the plaintiffs, and by *Davenport* for the defendants.

Dayrel, for the plaintiffs.—The plea is bad, first, because it does not state that the party had notice of the summons, and without notice there can be no default. In *Fisher v. Lane*,¹ it was held that the defence was not good where no notice had been given to the original defendant, the Court observing, that there could be no default, the original defendant never having been summoned, or having had notice, which was contrary to the principles of justice. If notice were not necessary to the debtor, there might be collusion between the plaintiff and the garnishee; and as a year only is given to impeach the judgment, the defendant after that period would be remediless. 2. The plea is bad in not stating that the party was within the jurisdiction. 1 Roll. Ab. 554; Customs de London (K), 3; Lutw. 977, 979, 984; Latch, 208; Godbolt, 400; Bohun, Priv. Lond. 213, 214. He also cited a case of *Still v. Amsinck*, tried at the sittings after last Hilary Term before Lord MANSFIELD. [Lord MANSFIELD.—The very essence of the custom is, that the defendant shall not have notice; because it is a proceeding against an absent man, who cannot be found, and has nothing to be summoned by. It is a proceeding *in rem*, like confiscations in the Exchequer.]

Davenport, contra.—The special cause of demurrer assigned is, that the plea amounts to the general issue; and no notice was given that it was the plaintiff's intention to attack the custom. The custom, as stated, is good. It is very convenient in a trading city, like London, that the debtor, by withdrawing out of the limits of the jurisdiction, should *not be able to [284] defraud his creditor of a remedy against his property by leaving it in the hands of a third person. It is sufficient to bring the case within the custom, if the debtor has property within the city. Besides, a year and a day are given to the defendant to appear and put in bail; and if he does so the attachment is at an end. With regard to the supposed case of collusion between the original plaintiff and the garnishee, the debtor is not prejudiced; for if there was no debt, he may come in and prove that fact. The plaintiff might have replied collusion. [*Per Cur.*—What do you say to the objection that it is not alleged in the plea that the garnishee was within the jurisdiction?] The answer is, that if the garnishee and the money were not in the city the attachment is nugatory. There is a return that the money was in the city. [BULLER, J.—The custom is an entire thing; and if it is wrong laid, you must fail. Could you maintain a custom all over England? It is a slip.]

Davenport said, that if the Court should be of that opinion, he should move to amend, by adding that the garnishee was within the city.

¹ C. B., T. 12 G. 2, 3 Wils. 297, 2 W. Bl. 884, S. C. From the latter report it appears that the Court held the defence ill, "there being no summons of the defendant Fisher, nor any return of *nil*il." "The report of the same case, in 2 Blackstone," says BEST, C. J., "shows that the Court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a summons with a return of *nil*il; that is, such a summons as I have mentioned, viz.: one that shows that the debtor is not within the city, and has nothing there by the seizing of which he may be compelled to appear." *Douglas v. Forrest*, C. B., E. 9 G. 4, 4 Bingh. 701. See also *M'Daniel v. Hughes*, B. R., H. 43 G. 3, 3 East, 372, 1 Saund. 67 a (n), 5th ed.

Lord MANSFIELD.—The money due follows the person of the debtor; therefore the garnishee must be within the city.

Davenport (and BULLER, J., assented).—The custom goes to goods in the city, though the garnishee be elsewhere.

Lord MANSFIELD agreed, and said that was the distinction between goods and a debt owing.

The case stood over for *Davenport* to consider whether he would amend; and the plea having been amended by inserting the words, "within the said city,"¹ the case came on again to be argued in this term by *Dayrel* for the plaintiffs, and by *Chambre* and *Davenport* for the defendants.

Dayrel recapitulated the arguments urged by him when the case was last before the Court, and relied upon the want of the allegation of notice, and that the party was indebted.

Chambre and *Davenport*, contra.—The demurrer has admitted the custom to be as stated, and the only question *is, whether that custom is legal, and has been pursued. This custom of foreign attachment has [*285] been much discussed, and is best described in the Year Book, 22 Edw. 4, 30 b, as certified by Starkey, recorder of London, "that if a plaint be affirmed in London before, &c., against any person, and it be returned *nihil*, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands; and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt, and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other after execution sued out by the plaintiff." No plea following the form of the custom, as here stated, has ever been held bad. The course with regard to notice to the party is particularly pointed out. There is a summons against the party; and on *nihil* returned there is process against the garnishee. In *Fisher v. Lane* the general issue only was pleaded, and the evidence was only minutes taken by the officer of the city court, which were defective. The report of that case in *Wilson* is very loose as to the arguments and facts on which the Court went. But in the report in *Blackstone* the reasons given are, because there was no summons of the defendant *Fisher*, nor any return of *nihil*, nor any information to the Court of the money being in the hands of the garnishee. All these circumstances are averred here. It is not singular that this form of notice should be sufficient. In a *scire facias* two *nihil*s are held equivalent to a *scire feci*. The party has a year to come in, and may, by giving bail, set aside the whole proceeding. With regard to pursuing the custom, as stated, the case in *Larch* does not prove anything; it was adjourned: but it was there stated, that the debt must be sworn to; and that was not averred, which may have been a ground for the opinion the Court inclined to. According to the custom, as stated in the Year Book, it is sufficient if the plaintiff claims a debt. In *Paramore v. Pain*, B. R., H. Eliz. 40 Cro. Eliz. 598, see 3 East, 379, the plaintiff in *the city was also the garnishee, see *Nonell v. Hullett*, B. R., T. 2 G. 4, [*286] 4 B. & A. 646, so that an averment of the debt was proper there, because it was in the knowledge of the garnishee, which in general it is not. For the same reason the debt might be traversed there, though in general not traversable. [BULLER, J.—We must take the custom as stated, and you must bring yourself within that custom. Now it is stated that it must be on a debt due, and you have not alleged that there is a debt. Your argument is, that it is not necessary by the custom, as stated in the Year Book, but it is

¹ See the amendments in the notes.

necessary by the custom laid.] If the debt must be averred it may be traversed, and that would be trying the cause.

BULLER, Justice.—We must take the custom as stated; and the question is, whether you have brought yourself within that custom. The averments must all be proved, and the debt may be proved by the same evidence by which the plaintiff in the original action proved it: he may be called on to prove it.

Lord MANSFIELD.—There is no difficulty at all. The original plaintiff is bound to support it; and if he does not, the garnishee will recover the money from him.

Chambre, then asked for leave to amend, which, with some difficulty, the Court granted.

The amendment was, by striking out the special plea, and pleading the general issue to the whole.¹

¹ But in *M'Daniel v. Hughes*, B. R., H. 43 G. 3, 3 East, 367, it was held that it was not necessary for the garnishee to prove the debt of the plaintiff below who attached the money in his hands. See also *Harrington v. MacMorris*, C. B., M. 64, G. 3, 5 Taunt. 228; *Banks v. Self*, C. B., T. 54 G. 3, 5 Taunt. 234 (n), 1 Saund. 67 a (n).

PHILLIPS v. BERRYMAN.¹ July 4.

A recovery in replevin is a bar to an action for an excessive distress.

THIS was an action on the statute of Marlbridge for taking an excessive distress. The declaration stated, that by a certain statute, &c., it was enacted that distresses should *be reasonable, and not too large, and [*287] that they who should take great and unreasonable distresses should be grievously amerced for the same excess of such distress, as in and by the said statute, &c.; yet the said John, not regarding, &c., on, &c., the goods, &c., of the value, &c., at, &c., did unreasonably and excessively distrain and take as a distress, although at the time, &c., the said John well knew that a small part, viz., one fourth part of the said goods, would have been a sufficient distress for the said sum and all the costs and charges, &c.: and although the said goods, &c., were at the time, &c., of such different and distinct qualities that the said John might have distrained on part thereof without distraining the whole, viz., at, &c., whereof the said John had notice, contrary to the form, &c.

The defendant pleaded, 1. Not Guilty; 2. That heretofore (T. 22 G. 3, B. R.) the said William impleaded the said John in a certain plea of taking and unjustly detaining the goods and chattels of the said William against sureties and pledges, &c., complaining that the said John, on, &c., at, &c., took the goods and chattels following of him the said William, and unjustly detained them against sureties and pledges, &c.; that the said John defended the wrong and injury when, &c., and said nothing in bar, &c.; that the said William, by the judgment of the said Court, recovered £15 for his damages and costs, which judgment is still in force; that the said William and the plaintiff in the former suit is the same person, and that the said John and the defendant in the former suit is the same person; and that the said goods and chattels and that the said taking and unjustly detaining in the former suit, and the said goods and chattels distraining and taking in the present suit, are the same identical goods and chattels, taking, distraining, and detaining, and not different. To this plea the defendant demurred generally.

¹ S. C. cited 1 Selw. N. P. 655, 4th edit.

Hotham, for the plaintiff.—The question is, whether a recovery in replevin is a bar to an action for taking an excessive distress, under the statute of Marlbridge. The object of the two actions is different, and the damages in one are given for a different cause from the damages in the other. At common law no action lay for an excessive distress, and the party might have taken a distress of greater value than the rent, so as to make it more eligible for the *tenant to redeem the goods by payment of the rent. *Lynne v. Moody*, B. R., M. 3, G. 2, 2 Str. 851. Trespass would not [*288] lie, because the entry was lawful. The statute of Marlbridge prohibited excessive distresses, but did not give any specific remedy. Still the remedy must be upon the statute. In replevin the plaintiff declares for the unjust taking and detention, and not for the excess. Evidence of the excess would be nugatory in that action. It will be said that the taking is averred to be the same, and that that fact is admitted by the demurrer; but a demurrer only admits what is well pleaded, and possible. Here the taking was in one case lawful, in the other unlawful.

Davenport, contra.—Although the statute of Marlbridge provides that the party shall be grievously amerced for his excessive distress, it does not follow that there was no remedy at common law. There has only been one injury, viz., the taking of the goods, and for that injury the plaintiff has elected to pursue his remedy by an action of replevin, in which he has recovered damages for the taking. He cannot separate one injury, and bring separate actions for different parts of it. [BULLER, J.—If it should appear on the trial of this action that there was no cause of distress, would not the plaintiff be nonsuited?] It is only where there is a just cause of taking that this action will lie, because it was only in that case that a remedy was required. An excessive distress, without cause, was completely remedied at common law by replevin or trespass.

Lord MANSFIELD.—Without doubt the plea is good. The plaintiff has already recovered his goods, and damages for the taking and detaining of them. In that action he has treated the taking as wholly tortious; and he shall not now be permitted to say that it was rightful in part.

WILLES, Justice, of the same opinion.

BULLER, Justice.—The statute of Marlbridge meant to give a remedy where there was none before, and on this ground the plea is good, for it shows that the plaintiff has already had his remedy. It is attempted to be argued that the taking is not the same, but, in fact, it appears sufficiently that it was the same. A recovery in one personal action is a bar to all other personal actions upon the same *subject-matter. *Hitchin v. Campbell*, C. B., T. 11 G. 3, 2 Blackst. 799; 3 Wils. 304, S. C. There [*289] must be Judgment for the defendant.¹

¹ See Hunt's Gilbert, p. 68; Bradby on Distresses, 276, 1st edit.

The KING v. The Inhabitants of GRINDON UNDERWOOD. July 7.

(Reported, CALDECOTT, 359.)

PHILPOT v. MULLER, and Another. July 8.

(Reported ante, vol. i. p. 169.)

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

IN THE TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

TURTLE *v.* LADY WORSLEY. *Nov. 8.*

Declaration for goods sold and delivered. Plea. Coverture of the defendant in abatement. Replication, that at the time of the making of the promises defendant was living separate and apart from her husband in adultery, and that she made the promises on her own credit, and for her own necessary use, &c. Demurrer. Held, that the plea was bad in abatement, as not giving a better writ.

THIS was an action of assumpsit for goods sold and delivered, to which the defendant pleaded her coverture in abatement. Replication, that the defendant, long before she made the said promises, &c., and before the exhibiting of the said bill, viz., on the 19th November, 1781, voluntarily and of her own accord did elope from and absent herself from the said Sir R. Worsley, her said husband, and continually from that time, and at the time of making the said promises, &c., and of exhibiting the said bill, hitherto did and still doth absent herself, and lives separate and apart in adultery from her said husband, and hath not been nor is yet reconciled to her said husband; and that whilst the said defendant so absented herself, and lived separate and apart in adultery from her said husband as aforesaid, she the said defendant made the said several promises aforesaid, on her own credit and for her own necessary use and account, solely and separately, in the manner of a feme sole, and not upon or for the use, credit, or account of her said husband—which plaintiff is ready to verify, &c. To this replication the defendant demurred, and the plaintiff joined in demurrer.

[*291] **Bower* for the demurrer.—The plaintiff knew that he was contracting with a married woman, and the question is, whether she, by living in adultery, acquired the power of making contracts to bind herself. It is settled that the husband is not liable upon the contracts of the wife entered into by her while living in adultery; but it does not follow from thence that she is herself liable. It cannot be maintained that a wife shall be held liable under these circumstances, unless she is also made capable of acquiring property. She may expect a fortune to be left to her, and may endeavor in this manner to secure it—this would tend to encourage adultery. The case of *Rinstead v. Lady Lanesborough*, ante, p. 197; turned upon particular circumstances, all of which were essential, and none of them occur here. The husband may be at any time reconciled to his wife; he may sue

the adulterer for keeping her from him. This is not one of those excepted cases in which, at common law, a feme covert may sue or be sued alone. The language of BLACKSTONE, J., in *Hatchett v. Baddeley*, C. B. E. 16 G. 3, 2 Black. 1082; is strongly in favor of the defendant. But it will be asked, is the wife to starve? The answer is, that as soon as she returns she is entitled to alimony. [Lord MANSFIELD.—That is not so, she never is entitled to alimony after adultery. The husband may be reconciled, but he never can be compelled to allow her anything; she can only have alimony pending the suit, see Ayl. Par. 58. Burr. Eccl. Law. Marriage, XII. 3 Black. Com. 94, 95]. It will follow at least, that if she can contract she must have property. [Lord MANSFIELD.—Not at all, the husband is entitled to everything that comes to her.] The question whether the husband ought not to have been joined for conformity is still open, *Lean v. Schutz*, C. B. E. 18 G. 3, 2 Black. 1195. [Lord MANSFIELD.—The truth is, that in that case the Court were greatly divided in opinion on the general question, and rode off on the point of conformity.]

Wood, contra.—The wife has forfeited the protection of her husband, and her right to dower and alimony. The husband is not liable, and therefore need not be joined. *Morris v. Marten*, Coram Raymond, C. J. 1 Str. 647; *Child v. Hardyman*, Coram Raymond, C. J. 2 Str. 875; 2 Inst. 435. [*292] *If the husband is not liable, what is the remedy of the creditor, and [*292] is not the wife to be allowed to supply herself with necessaries? This does not resemble the case of *Hatchett v. Baddely*, for here it is averred that the wife was living apart in adultery, and was not reconciled. In that case too, the action was not for necessaries. *Lean v. Schutz* was a case of separate maintenance; which was also one of the grounds in *Ringstead v. Lady Lancashire*.

BULLER, Justice.—Is there any case where a man is joined for conformity, against whom no judgment can be given?

Lord MANSFIELD.—This is a new case, and of very extensive consequence. All the cases where it has been held that the husband is not liable, proceed on the supposition that the wife is not entitled to alimony, because alimony may be more but cannot be less than necessaries. If the husband were liable for alimony, the creditor would certainly stand in the place of the wife. Let the case stand for further argument by civilians.

On this day Lord MANSFIELD said—This case stands to be argued on Tuesday by civilians; but there is no point to argue, for the plea being in abatement is bad.

BULLER, Justice.—Coverture is sometimes a plea in abatement, but it is in all cases subject to the general rule, that a plea in abatement must give a better writ. It is proper when a married woman is sued for a debt contracted while sole. It is giving notice that she is now married, and that her husband must be sued with her. That gives a better writ. It would be proper in this case, on the plea alone; but it appears by the replication, the facts of which are admitted on demurrer, that she was married at the time of the promise made, but separated from her husband, and living in adultery. The husband therefore cannot be sued; and it appears upon this record, that the plaintiff cannot have any better writ; and consequently the plea amounts to the general issue, and there must be judgment of *Respondeas ouster*.

death, continued to sell the same. The defendant sold a medicine under the same name and mark. Held that no action could be maintained against him by the plaintiff.

THOMAS SINGLETON, the plaintiff's father, sold a medicine called "Dr. Johnson's yellow ointment." The plaintiff, after his father's death, continued to sell the medicine, marked in the same way. The defendant also sold the medicine, with the same mark, and for that injury the present action was brought. It was tried before Lord MANSFIELD, when the plaintiff was nonsuited. A rule having been obtained for a new trial,

Lord MANSFIELD said, that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie.¹ But here both the plaintiff and defendant use the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could have been maintained was that of property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration.

Rule discharged.

¹ Thus where a manufacturer adopted a particular mark for his goods, in order to denote that they were manufactured by him, it was held that an action on the case was maintainable by him against another person who adopted the same mark for the purpose of denoting that his goods were manufactured by the plaintiff, and who sold the goods so marked as and for goods manufactured by the plaintiff. *Sykes v. Sykes*, B. R., M. 5 G. 4, 3 B. & C. 541; 5 D. & R. 292, S. C.

ELLIS v. GALINDO. Nov. 18.

(Reported ante, vol. i. p. 250, (note † 71).)

[*294] *DENN dem. BRIDDON and Another v. PAGE.¹ Nov. 14.

Devise to S. N. for life; remainder to trustees, &c.; remainder to the first and other sons of the body of S. N., and the heirs-male of their respective bodies; and for default of such issue, to all and every the daughters of S. N., begotten or to be begotten; and for default of such issue, to the right heirs of T. N. for ever. Held that the daughters of S. N. took life estates only.

THIS was an ejectment tried at Derby, where the verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Mary Trollope, being seised in fee of the premises in question in 1784, devised as follows: "As touching the rest of my temporal estate, I give and devise all my messuages, lands, tenements, hereditaments, at Whitwell and elsewhere, to John Toplis and his heirs, upon the trusts following: To the use of Thomas Nash, and Mary his wife, for 99 years, if they or either of them shall so long live: remainder to Samuel Nash, son of the said Thomas Nash, for life: remainder to the trustee, to preserve contingent remainders: remainder to the use of the first son of the body of the said Samuel Nash, and of the heirs male of the body of such first son; and for default of such issue, to the use of the second, and every other son and sons of the body of the said Samuel Nash, severally and successively, and in remainder, one after another, and as they shall be in seniority of age and priority of birth, and of the several and respective heirs-male of the body and bodies of all and every

¹ S. C. 11 East, 608 n., from the MSS. of BULLER, J., 1 B. & P. 261 n.

such son and sons, and the heirs-male of his and their body and bodies, lawfully issuing; and for default of such issue, to the use of the second, and every other son and sons of the body of the said Thomas Nash, upon the body of the said Mary his wife, begotten or to be begotten, severally and successively; and in remainder, one after another, as they shall be in seniority of age and priority of birth; and of the several and respective heirs-male of the body and bodies of all and every such son and sons, and the heirs-male of his and their bodies, lawfully issuing; and for default of such issue, to the use of all and every the daughter and daughters of the body of the said Thomas Nash, on the body of the said Mary his wife, begotten or to be begotten; and for default of such issue, to the right heirs of the said Thomas Nash for ever." The testatrix, amongst other legacies, gave *£50 each to Mary and Jane, the daughters of the said Thomas Nash. On [*295] the death of the testatrix, Thomas and Mary Nash entered, and were possessed of the premises during their lives, and died leaving issue Samuel, Mary, and Jane. On the death of Thomas and Mary Nash, Samuel Nash entered. Mary Nash, the daughter, died in 1762, leaving issue several sons and daughters. In 1766, Samuel Nash died, leaving issue only a daughter, Mary, one of the lessors of the plaintiff. On his death, Jane, the surviving daughter of Thomas Nash, entered on the premises, and afterwards suffered a recovery, and sold to the defendant Page. Jane Nash died in 1782, and on her death the lessor of the plaintiff Mary, who is the heir-at-law of Thomas Nash, claimed the estate.

The question for the opinion of the Court was, whether Jane Nash took an estate for life or in tail.

Balguy, for the plaintiff.—The defendant claims under the limitation to all and every the daughter and daughters of the body of Thomas Nash, on the body of Mary his wife, begotten or to be begotten, and for default of such issue, to the right heirs of Thomas Nash. The question is, whether under this limitation the daughters took an estate for life or an estate in tail by implication. This is a question of intention. The words "as touching the rest of my temporal estate," do not show that the testatrix intended more than an estate for life. Right dem. *Mitchell v. Sidebotham*, B. R., T. 21 G. 3, ante, vol. ii. p. 759. In that case it is laid down, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. In order to discover the intent of the testator in using the words "in default of such issue," it is necessary to examine in what sense they are used in other parts of the will. Now, in the prior limitation to the sons of Thomas Nash, the words "in default of such issue," mean such sons, and the same construction must be put upon the same words when they follow the limitation to the daughters. They therefore mean "for want of daughters." An express estate cannot be destroyed by implication. *Bamfield v. Popham*, Canc. 1702, 1 P. Wms. 54; *Barry v. Edgeworth*, Canc. 1724, 2 P. Wms. 523. But it will be said that an estate tail must be implied in order to *effectuate the intention of the testatrix, for which *Robinson v. Robinson*, B. [*296] R., M. 30 G. 2, 1 Burr. 38, is an authority. No such intention, however, can be collected from this will, which is evidently drawn by a conveyancer, and is technical throughout. Where language which has acquired a definite meaning in the law is used, the Court will not presume an intention contrary to the words. The testatrix might well mean to prefer her right heir, whom she must know, to the daughters of Thomas Nash. Supposing an estate tail implied, what is it to be? If general, then it is larger than the estate given to the sons, and there are no words to confine it. The words of the will are plain, and at the utmost the intention is only doubtful.

Hill, Sergeant, contra.—This is a question of intention, and upon the

whole of the will it clearly appears to have been the intention of the testatrix to give to the daughters a greater estate than for life, viz., an estate in tail general. The words "for default of such issue," following the limitation to the sons, mean for default of the issue male of the sons at any period, however remote; and in the same manner the words "for default of such issue," after the limitation to the daughters, mean in default of the issue of the daughters. There are other circumstances of probability to show the intention of the testatrix. The devise is to daughters begotten, or to be begotten. Daughters might be born after, and then the remainder over to the right heirs could not take place, if the after-born daughters took only an estate for life. Words of limitation have been frequently supplied. *Wyld v. Lewis*, Canc. 1 Atk. 432; *Evans v. Astley*, B. R., M. 5 G. 3, 3 Burr. 1570; *Power v. Campbell*, T. 1773, on error from Ireland. [Lord MANSFIELD.—You may take it for granted, without citing cases, that manifest intention will supply words of limitation.]

Balguay, in reply.—There is no dispute as to principles; the only question is, what was the plan and evident intention of the testatrix? As to the construction of the words "such issue," *Bamfield v. Popham*, is a decisive authority. They are words of reference, and mean such issue as are before mentioned. In the preceding limitations they mean "for default of son or sons." [Lord MANSFIELD.—They mean "default of all those [*297] limitations."] The words cannot enlarge the interest given under any of the limitations. They are only co-relative and co-extensive with that interest. So when they follow the limitation to the daughters, which is clearly only an interest for life, they cannot enlarge that interest into an estate tail. The estates to the sons are in tail male, and what is there to show that the testatrix intended to prefer the son of a daughter, or the daughter of a daughter, to the daughter of a son? She might mean a personal bounty to the daughters, for they have legacies given them. By holding this an estate for life, the limitation over will not be defeated, for it is no more than a reversion, the heir of T. Nash being the heir of the testatrix.¹

Lord MANSFIELD.—This is a question which does not admit of argument, nor of a case to be cited. The rules of law are clear. In the construction of deeds, a grant without words of limitation enures for life only; and when questions as to wills first came into Courts of Common Law, the judges followed the rule as to deeds, and not the rule of the Civil Law as to bequests, see *Hogan v. Jackson*, B. R., T. 15 G. 3, Cowp. 305. I have frequently said, that, in almost all cases, the Court, in holding it a life estate, defeats the intention of the testator, because common persons do not advert to the difference between lands and chattels. The Court, therefore, is astute in finding out circumstances of intent from which a limitation may be implied, and takes advantage of such circumstances with pleasure. The question, then, always is, whether there is enough on the face of the will to imply a limitation; for we cannot go into conjecture. I do indeed conjecture, that a further limitation was intended, but I do not know what. Is there then any power to supply a limitation omitted? It is unfortunate, but there is no remedy. Had the words been, "and if they die without issue," it might have been a ground to imply an estate tail. But here you must strike out the word *such*. Then what are the circumstances of intention? I cannot say that the testatrix meant to prefer the issue of daughters. [*298] How are we to supply the deficiency? *With a general or a special limitation? There is no light to go by.

¹ The fact that the lessor of the plaintiff was heir-at-law to the testatrix was taken for granted, both in the argument and in the judgment, though it did not appear in the case.

BULLER, Justice.—It seldom happens that in the case of wills, the decision in one instance is found applicable in another. Here *Right v. Sidebotham* has no application. There is, however, one case which has been overlooked, but which is strongly in point, *Price v. Warren, Skinner*, 266, which went to the House of Lords. That case was stronger than the present. Here there is nothing in the will to show such an intention as ought to disinherit the heir at law.

Postea to the plaintiff.¹

¹ See *Hay v. Coventry*, B. R., H. 29 G. 8, 8 T. R. 83; *Foster v. Lord Romney*, B. R., M. 50 G. 8, 11 East, 594; *Doe dem. Liversage v. Vaughan*, B. R., H. 2 & 3 G. 4, 5 B. & A. 464, 1 D. & R. 52, S. C.; *Doe dem. Tooley v. Gunniss*, C. B., E. 52 G. 3, 4 Taunt. 818; *Doe dem. Pinnock v. Dickson*, post. See also *Hayes's Principles* for expounding dispositions of real estate to ancestor and heirs in tail, &c., p. 32.

SALOMONS v. STAVELY.¹ Nov. 11.

In declaring against the endorser of a foreign bill of exchange, the omission of the averment of protest is only matter of form, and cannot be taken advantage of under a general demurrer.

THIS was an action on a foreign bill of exchange against the endorser. The declaration stated that the defendant "had refused to accept or pay the same, of all which premises the said defendant afterwards, and with all convenient speed, to wit, on, &c., had notice." To this declaration the defendant demurred generally.

Bower, for the demurrer.—The declaration is bad, in omitting the allegation of a protest. This being a foreign bill of exchange, the protest is part of the custom. The bill being drawn from England on a person in Bengal is a foreign bill. An inland bill is where both parties reside here. That is the definition given in *Bacon's Abridgment*, vol. iii., p. 608. The endorser of a bill is exactly in the situation of a new drawer; and in *Brough v. Perkins*, B. R., M. 2 Ann. 6 Mod. 80, 1 Salk. 181, 2 Ld. Raym. 992, S. C., it is said by *HOLT, C. J.*, that, in the case of a foreign bill, "no [*299] one can resort to the drawer for non-acceptance or non-payment, without a protest. The necessity of a protest appears also from *Molloy, De jure maritimo*, B. ii. c. 10, § 28. It will be said that protest is only notice. The answer is that the only legal notice in case of foreign bills is a protest. In this case, one set of bills was sent to the West Indies, and the defendant could not recover them for want of a protest.

Morgan, contra.—It is not necessary to deny that this is a foreign bill, or that in the case of a foreign bill, a protest is necessary; but this mode of declaring cannot be taken advantage of on general demurrer. In the old entries the custom with regard to bills of exchange is variously stated, but in several cases it was held that the custom need not be stated which introduced the present general way of declaring. *Mogadara v. Holt*, B. R., M. 8 W. & M. 1 Show. 817. Now the protest is part of the custom, and as such need not be alleged. The want of the protest may be taken advantage of under the general issue. There are two precedents in the books where no protest is averred, *Lilly*, Ent. 55,² *Brown's Vade Mecum*, 27, Prec. 80, though the latter appears to be the case of an inland bill.

Bower, in reply, contended, that the title being defectively set out, the defendant might take advantage of it on demurrer without the expense of a trial.

¹ Note of S. C. ante, vol. ii., p. 683, note †, 144.

² In this form (against the drawer) no notice whatever is alleged. It is therefore clearly bad.

Lord MANSFIELD.—There is no doubt but this is a foreign bill, and that a protest and notice of the protest are necessary; but it does not follow that this declaration is bad. Notice is alleged, and protest is the only legal notice. Therefore, on the trial, a protest must be proved.

BULLER, Justice.—The case in Lilly's Entries is in point. The only question is, whether the not alleging a protest in the declaration is form or substance? If form only it cannot be taken advantage of on general demurrer. The Court must have thought so in the case in Lilly.

Demurrer withdrawn on payment of costs, and giving judgment of the term.

[*300] *The KING v. The Inhabitants of CHEW MAGNA. Nov. 12.

(Reported, CALDEWOTT, 365.)

The KING v. The Inhabitants of EDON, LONGDON, and STANLEY.
Nov. 12.

(Reported, CALDEWOTT, 374.)

TONKIN v. FULLER. Nov. 15.

Victualling bills are not assignable; but by usage, a power of attorney, to the attorney, his substitutes and assigns, to receive the money, authorizes the attorney to assign. Such a power is called a *general* power, in contradistinction to a special power, which authorizes the attorney only to receive. Where an attorney, acting under the latter power, deposited certain victualling bills with the defendant, as a security for money borrowed from him, in an action of trover by the payee of the bills, held that the plaintiff was entitled to recover.

THIS was an action of trover for four victualling bills. The bills in question were drawn in the usual form by the commissioners at Plymouth, on the treasurer of the victualling office in London, and were not in a course of payment when the action was brought. They began thus: "Mr. Treasurer, we pray you pay unto Mr. Peter Tonkin the sum of, &c." By the terms of the bills they were payable to Peter Tonkin only, and not to his order.

The cause was first tried before Lord LOUGHBOROUGH at Guildhall, after Easter Term, 1783. The plaintiff proved that the defendant had the bills in his possession. The terms in which the bills were drawn afforded *prima facie* evidence of the plaintiff's property in them. He then proved a demand and refusal. The defendant, in answer to this, contended, that the plaintiff had delivered the bills to one Denham Briggs (since a bankrupt), and had executed to the said Denham Briggs a letter of attorney, which authorized him, as it was alleged, to dispose of them as he pleased, and that Denham Briggs, by his agent D. Berry, had deposited them with the defendant as a security for a sum of money borrowed of him. In support of this defence the defendant did not produce the letter of attorney itself, but an entry of it in the pay office in the following words; "Peter Tonkin (of Plymouth), letter of attorney to Denham Briggs, Esq., to receive and give receipts and discharges for all sums of money due to him from the commissioners [*301] *of the victualling." Dated 12th December, 1777. The plaintiff would have proved by the officers of the pay office, that this was an entry of a special letter of attorney to receive the contents of the bill when due, and that the entry of a general letter of attorney to receive and assign

would have been different; but Lord LOUGHBOROUGH, before whom the cause was tried, declaring it to be his opinion that a letter of attorney to receive was a letter of attorney to assign, such proof became useless. Lord LOUGHBOROUGH summed up very strongly for the defendant, upon which the plaintiff submitted to be nonsuited.

In Trinity Term the plaintiff commenced this action in the King's Bench, and declared in Middlesex, where, being an attorney, he had a right to keep the venue. The trial came on at the sittings after Trinity Term. In addition to the above proofs the officers of the pay office gave the following evidence:

That victualling bills were in practice assigned by a blank assignment which accompanies the bill. That this assignment may be made either by the payee, or his attorney, properly authorized to make it. That the letters of attorney which a payee may execute are of two sorts: one gives an authority to the attorney to receive and give discharges, the other gives this authority to the attorney, his substitutes and assigns (a printed form of each sort was then produced, in which this difference appeared). That the former, which is called a special letter of attorney, enables the attorney to receive the money when due, but gives him no power to assign; and that the pay office would not pay the contents of the bill, when due, to the assignee of such an attorney. That the latter, which is called a general letter of attorney, enables the attorney to assign as well as to receive. That an entry of such letters of attorney is made at the pay office. That assignments made by attorneys are usually brought to the pay office to be marked, upon which the officer examines whether there be an entry of a general letter of attorney; and if he finds one, he marks the assignment, which mark denotes that the attorney had authority to assign. That the entry above stated is an entry of a special letter of attorney to receive only. That a general letter of attorney is entered thus: "A. B., letter of attorney to C. D." [The books, which were produced, showed this distinction.] That the officer [*302] told the defendant who applied to him, that he would not mark an assignment made under the special letter of attorney entered as is above set forth.

Lord MANSFIELD left the case to the jury with nearly the same observations as he afterwards made in delivering his opinion on the motion for a new trial. The jury found a verdict for the plaintiff.

The defendant having moved for a new trial, *Cowper* and *Piggot* were heard for the rule, and *Wilson*, *Peckham*, and *Gibbs* against it. In support of the verdict the case of *Maclish v. Ekins*, B. R., H. 26 G. 3, *Sayer*, 73; and see note of S. C., 13 East, 515 a, was cited. The defendant's counsel would have produced at the trial, and now again insisted upon a subsequent decree of Lord HARDWICKE for staying proceedings in that cause, but as the grounds of the decree did not appear, the Court would not suffer it to be read. It was argued for the defendant, that the usage of assignment gave him a title to the bills. The plaintiff's counsel contended that the defendant had no right by the general law, and that the mode of assignment established by the usage had not been observed in the present case.

Lord MANSFIELD.—I never had any doubt on this point, but as it is a very material one, I wished it to be considered here. The question may just as well have been tried by a Middlesex as by a London jury. They had nothing to determine but the usage, and of that the evidence was all one way. The only question is, who has the property in the bill? It must be the plaintiff's, unless he has done something to entitle another. It is deposited with the defendant by one who had it under a limited power of attorney. If the plaintiff had ever consented to the disposal of the bill, he

would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretence. The plaintiff and the defendant are equally innocent. As to the usage, the thing is not assignable, but by a contrivance it becomes so. A common letter of attorney does not enable the attorney to assign; *delegatus non potest delegare*. The power is revocable till the money is received. The general letter of attorney makes these bills assignable, and substitutes and assigns may receive. The letter [*303] of attorney is registered, and the assignment is marked *at the pay office. These facts were not disputed. Independently of the usage, this letter of attorney does not at law convey a power to assign. The defendant has taken the bill under a bad title.

BULLER, Justice.—It is admitted that, by the general law, the defendant has no title, but he contends that the usage gives him a right; yet that usage is against him. This has been resembled to the case of a bond deposited by an obligee in a third hand, but the cases are not similar. The obligee *has*, Briggs had *not*, a power to assign and dispose of the paper. This is a mere question upon the usage, which is clearly with the plaintiff, and the case of *Maclish v. Ekins* is clearly in point for him.

Rule discharged.

DOE dem. The DUKE of NORFOLK *v.* SANDERS. Nov. 15.

The widow of tenant in tail of copyhold is entitled to her free-bench, though there is no custom as to the free-bench of widows of tenants in tail, but only as to the free-bench of widows of tenants in fee.

EJECTMENT by the lessor of the plaintiff, as lord of the manor of Whetham, under stat. 9 G. 1, c. 29, to recover possession on non-payment of fine. The cause was tried at the last assizes for Sussex, when the following case was reserved for the opinion of the Court:

The lessor of the plaintiff is lord of the manor of Whetham, and the premises in question were held of the same manor by copy of Court-roll to Robert Sanders and his heirs. By the custom of the manor, the widows of tenants in fee are entitled to their free-bench, on the payment of one penny to the lord. The copyhold tenants in fee have been accustomed to settle their estates in strict settlement and in tail, but no instance has existed in which the widow of a tenant in tail has survived her husband, except the present defendant.

The said Robert Sanders having first surrendered to the use of his will, devised the premises to his nephew Robert Sanders, and to his heirs and assigns for ever; and in default of issue of the body of the said Robert Sanders, to Joseph Sanders and his heirs for ever. Robert Sanders, the devisee, was admitted and died seised, leaving the defendant his widow, and two daughters. The defendant tendered one penny, and prayed to be admitted to her free-bench. The [*304] lord admitted the eldest daughter as customary heir,¹ and having assessed a fine, now brought this ejectment under the statute 9 G. 1, c. 29. Notice of this assessment and fine was served accordingly.

The question for the opinion of the Court was, whether the defendant, as widow of Robert Sanders, the devisee, was entitled to her free-bench.

Steele, for the plaintiff.—The question is, whether on the custom stated,

¹ The case did not state the daughter admitted to be an infant, which was necessary to support the ejectment under the statute. But the defendant wishing to take the sense of the Court on the merits, the objection was not made.

of Cumberland, by erecting a weir and stells, &c., across the river, below the plaintiff's fishery, which prevent the fish from passing up the river to the fishery of the plaintiff. Plea, not guilty. At the trial of the cause at Carlisle before BULLER, J., the plaintiff proved his title as stated in the declaration; and the defendant, who was the lessee of the corporation of Carlisle, to whom the fishery was worth £800 a year, tendered evidence to prove an immemorial exercise of the fishery by the corporation and their lessees in the manner complained of by the plaintiff. The plaintiff thereupon insisted that such a fishery was illegal by statute, 2 H. 6, c. 15, which prohibits weirs. The defendant contended that the act only applied to navigable rivers, and that the object of it was only to preserve the navigation, and to prevent the destruction of *the fry, neither of which injuries was proved to have occurred in the present case. It was also objected that the action [*308] would not lie, as it was an action brought for a public nuisance. BULLER held that the statute was decisive of the question, and that it rendered the fishery claimed by the defendant illegal, and he directed a verdict for the plaintiff.

A new trial was moved for on the grounds urged at the trial; but the Court being of opinion that the action lay, the argument turned chiefly upon the effect of the statute, 2 H. 6, and other acts *in pari materia*.

Lee, S. G., Sir T. Davenport, Scott, and Wood, showed cause.

Wilson, Chambre, Arden, and Law, contra. They relied on *Magna Charta*, c. 2; 25 Ed. 3, c. 4; 45 Ed. 3, c. 2; 1 H. 4, c. 12; 12 Ed. 4, c. 7, and cited the case of the Chester Mill, E. 7, Jac. 1, 10 Rep. 137 b. The defendant was prepared to prove that the weir had existed from time immemorial, and therefore the claim of the plaintiff must be subject to it. The plaintiff's claim was as owner of the soil, which was *prima facie* evidence of a right to fish, but might be restrained by other rights. None of the acts, of which there are many, professedly made to protect the fisheries, prohibit such erections. The statute, 2 Hen. 6, c. 15, was made to prevent "the destruction of the brood and fry of fish, and disturbance of the common passage of vessels." The fry are not injured by this weir, nor is the passage of vessels disturbed. The river Eden was never navigable beyond this stell or weir, as appears from an act passed in the reign of George I. to render it navigable up to this point. If there be any doubt as to the application of the statute, the usage which has prevailed would be explanatory of it, and would govern the construction.

LORD MANSFIELD.—The opinion at *Nisi Prius* went solely on the ground of the statute. If that clearly prohibits this mode of fishing, there is no doubt that the plaintiff may maintain this action. The injury is not to all the king's subjects, but to those who have a right of fishing. As the case now comes before the Court, it must be admitted that the weir has stood from time immemorial; that it does not interrupt the navigation; that it does not destroy the spawn or fry of *the fish; and that it is not perpetual. The value of the fishery is great, and the long usage is [*309] material, and I am unwilling to shut up the point. It is perfectly clear that the act of Parliament cannot go into desuetude, and that the usage cannot repeal it. I do not give any opinion, but there are circumstances in the act to narrow its construction. It certainly does not mean all rivers. The erection is not prohibited, but the standing continually. I should lean very much in favor of the defendant. I think there should be a new trial, for the purpose of putting the facts into a special verdict, the defendant to admit that the plaintiff is entitled to the fishery.

BULLER, Justice.—I agree that there should be a new trial for the purpose mentioned. It may be a great question, if it comes to the construction

of the act; but if it turn out that the defendant has not used this weir immemorially, that point will not arise. I do not think that the other acts mentioning weirs apply. They are made on other subjects. Weir does not necessarily mean anything built across a river. Garth is an enclosure, and not the same as stell. As to the usage, I know of no authority that local usage in a particular river, however large, can be of any weight in construing a general act of Parliament.

Rule absolute.¹

¹ In *Wild v. Hornby*, B. R., H. 46 G. 8, 7 East, 199. Lord ELLENBOROUGH appears to refer to this case (in which he was counsel) in the following passage: "I remember that the stells erected in the river Eden by the late Lord Lonsdale and the corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced in this Court upon a motion for a new trial, to be illegal and a public nuisance." In the report of the same case in 3 Smith, 247, his Lordship is made to say, "At the Eden where the corporation of Carlisle and Lord Lonsdale have stells for the catching of fish, it was held that the keeping of them close day and night was a public nuisance; and Lord KENYON said, no man can claim an estate in a public nuisance. When BULLER, J., came to try that cause, he admitted evidence of usage, however, thinking that under certain restrictions these stells might be allowed by usage."

[*310] *DOE, on the demise of DAVY and Others, *v.* HADDON. Nov. 19.

In ejectment against a schoolmaster who has been removed by sentence of the trustees of the school for misbehavior, it is not necessary for the lessors of the plaintiff to prove the grounds of the sentence, nor can the defendant disprove them. The defendant may give in evidence the declarations of a former trustee who signed the sentence, and who is since dead, for the purpose of showing that his signature was corruptly obtained.

Where the constables of a township are (amongst others) made trustees of a school, in ejectment by the trustees against the schoolmaster, it is sufficient to show that the constable acted as such, without proving his election and swearing in.

THIS was an action of ejectment for lands in Suffolk, devised by a Mr. Metcalfe for the support of a school in the parish of Storham. The cause was tried at Bury before HOTHAM, B., when the following facts appeared in evidence: The premises were devised to trustees, and the election of the schoolmaster was directed to be by the rector, church-wardens, and constables, to whom also the power of amotion was given, on cause to be adjudged by them. The electors having removed the defendant, who was schoolmaster, for several causes stated in the instrument of removal, and amongst others negligence and drunkenness, filed an information in Chancery against him, which was dismissed without costs, the Chancellor being of opinion that the remedy was at law. His Lordship at the same time directed the heir of the surviving trustee to convey to new trustees, who were the lessors of the plaintiff. On the part of the defendant, evidence was given that Davy, one of the lessors of the plaintiff, and who had also been church-warden at the time of the amotion, had said that he would spend £500 rather than not turn out the defendant; and evidence was tendered that Amos, a constable, who had signed the instrument of amotion, and who was since dead, had said in his lifetime that he should not have signed the adjudication of Davy, had he not threatened to get him turned out of his office as constable, which was worth £2 10s. a year. The learned judge was of opinion that this evidence was inadmissible, and a verdict was found for the plaintiff. A rule nisi for a new trial having been granted on three grounds, first, that there was not sufficient evidence of notice to the defendant to attend at the meeting for his removal; secondly, that the learned judge had not put the plaintiff on proving, and had not permitted the defendant to dis-

prove the charges in the instrument of removal; thirdly, that no evidence was given of the election of the constables who removed, but only that they acted as such.

Graham and Le Blanc showed cause. The removal was an adjudication of persons having competent authority, and like a conviction by a justice of the peace, or a removal by a *college or corporation, good until reversed by some legal proceeding. It might, perhaps, be questioned in Chan- [*311] cery, that Court having a general superintending power over charities, or perhaps a mandamus might lie to restore the defendant; but it cannot be brought in question before a jury in an ejectment, where it is sufficient to show a legal title.

Partridge and Preston, contra.—In convictions under the Excise laws, the grounds of the convictions are gone into in actions against the officers, at least it is a disputed point, and the contrary is not yet settled. [Lord MANSFIELD said, that he did not know that the merits of the conviction could be gone into, and that he rather thought not.¹] The authority to remove in this case is given not to persons but to officers, therefore strict proof of their appointment ought to have been given, yet no proof was adduced of the election or swearing in of the constables, or at least of one of them. Evidence also was rejected of the declaration of one of the electors, who was dead, that he had signed the adjudication, by the persuasion of Davy, against his own opinion. This declaration was admissible, under the authority of *Doe, dem. Clymer v. Littler*, B. R., M. 2 G. 3, 3 Burr. 1255. Lastly, no notice to quit was given by the lessors of the plaintiff to the defendant, who ought to have received such notice, his title being prior to that of the present trustees. [Lord MANSFIELD.—I have no doubt upon any part of the case, except the declaration of Amos, which was rejected. As to that I wish to hear the counsel on the other side.]

Graham, in reply.—The evidence of Amos's declaration was not admissible to contradict his signature. There is no instance of such declarations being allowed to be evidence. The case of *Doe dem. Clymer v. Littler* depended on very peculiar circumstances. Nothing is more dangerous than to admit such evidence. If Amos had been alive, he could not have contradicted his own act. But supposing the evidence admitted, it does not amount to anything that could invalidate the adjudication, and the Court therefore will not grant a new trial.

*Lord MANSFIELD.—Several grounds have been urged in support of the rule for a new trial. The first is, that there is a defect of [*312] evidence. As to this, the Court looks into the merits of a case, and if they are not with the application, slight evidence, if the jury believed it, will be sufficient. The evidence of the notice is certainly sufficient, and so is the evidence of the appointment of constables. The defendant, on any of these grounds, should have supported his application by an affidavit of the facts. With regard to the not going into evidence of the charges, I think the learned judge was right. The adjudication was in a domestic forum, and the merits of it cannot be entered into in an ejectment. But my doubt is upon the rejection of evidence tending to show corruption in one of the judges. Whenever a judgment is obtained by fraud, it is open to go into it. Here is a criminal charge against one of the judges.

WILLES, Justice.—I am of the same opinion as to the two first objections. The last is a nice point. If the adjudication was corrupt, it cannot stand. The Court did not admit evidence to show Davy's malice, which was a sort

¹ See *Terry v. Huntingdon*, Hard. 480; *Fuller v. Fotch*, Carth. 346; *Roberts v. Fortune*, Harg. Law Tracts, 468, (a); *Brittain v. Kinnaird*, 1 B. & B. 432; *Henshaw v. Pleasance*, 2 W. Bl. 1174; 1 Phill. Ev. 355; 7th ed. Stark, Ev. p. ii. 236.

of introduction to the evidence which was rejected. I incline to think, under all the circumstances, that in this case the evidence ought to have been admitted.

BULLER, Justice.—Corruption is admitted on all hands to vitiate, and how can it be proved, if not by the declarations of the persons guilty of it? I think there ought to be a new trial.

Rule absolute—on the defendant's undertaking to admit the plaintiff's title, the notice, &c., and to confine his defence to the single point of corruption.

The cause was again tried before **WILLES, J.**, at the Lent Assizes, 1784, and evidence was given of Amos's declaration, which was uncontradicted. A verdict having been again found for the plaintiff, the Court set it aside in the following term, as against evidence. A third trial was then had, before Lord **LOUGHBOROUGH**, at the Summer Assizes, 1784, when, on evidence of contrary declarations by Amos, a verdict was again found for the plaintiff.¹

¹ The principle upon which this case, so far as it respects the conclusiveness of the instrument of amotion proceeded, has been frequently recognised; see *Philip v. Bury*, B. R., T. *6 W. & M., 1 Lord Raym. 5 Comb. 265; Holt, 716; 1 Show. 360; [*313] *Skinner*, 447; 4 Mod. 106; 2 T. R. 346, S. C. *Rex v. Grondon*, B. R., T. 16 Geo. 3; Cowp. 315; *Moody v. Thurston*, B. R., M. 8 Geo. 1, Str. 481; 1 *Phillip's Ev.* 356, 7th ed.; but where the visitors and feoffees of a school dismissed the schoolmaster for misconduct, but omitted to summon the master before them previously to such dismissal, it was held that they were not entitled to maintain an action of ejectment. *Doe dem. Earl Thanet v. Gartham*, C. B., M. 4 Geo. 4, 1 Bing. 357.

With regard to avoiding a judgment or sentence on the ground of fraud, a distinction has been taken where the person seeking to avoid it was party to the judgment or sentence, in which case it has been held that he cannot allege the fraud in a collateral suit, but ought to apply to the Court or tribunal which pronounced it to vacate it. *Prudham v. Phillips*, cited and recognised in *Meadows v. Duchess of Kingston*, Canc. 1775; *Ambler*, 763; *Hargrave's Law Tracts*, 456, S. C., and see 2 *Evans's Pothier*, 311.

As to the evidence of the appointment of the constable, it was said by **BULLER, J.**, in *Berryman v. Wise*, B. R., T. 31 Geo. 3, 4 T. R. 866, that, in the case of all peace-officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments, and that even in case of murder; and see *Gordon's case*, 1 *Leach*, C. C. 518, 4th ed.

KEENE, on the demise of **PINNOCK** and Another, *v.* **DICKSON**.¹ Nov. 21.

Devise to G. P. for life; remainder to trustees, to preserve, &c.; remainder to the first son of G. P. and the heirs of the body of such first son; remainder to the other sons in like manner; and for want of such issue male, then to the use of all and every the daughter and daughters of G. P.; and for default of such issue, to R. C., and the heirs of his body, he taking the testator's name. G. P. had only one son, who died without issue, and two daughters, who were the heirs-at-law of the testator. Held by Lord **MANSFIELD**, and **BULLER, J.**, that the words "for default of such issue male" rendered the subsequent devise contingent on their being no son of G. P., and that there having been a son, who died, the devises over were void, and the daughters took (as heirs) in fee. Held by **WILLES, J.**, that the daughters took joint estate for life, and (*semble*) remainders in tail.

THIS was an ejectment for lands in Warwickshire, tried, by consent, in Middlesex, after last term, before Lord **MANSFIELD**, when a special verdict was found, which stated as follows:

¹ S. C., cited 3 T. R., 495, and reported, but without the arguments of counsel, and the judgment of **BULLER, J.**, 1 B. & P. 254 (n).

Henry Dakins, being seised in fee of the premises in question, on the 5th of August, 1747, devised his real estates in Great Britain to his brother, Philip Dakins, for *life; remainder to his niece, Grace Pinnoek, for [*314] life; remainder to trustees, to preserve contingent remainders; remainder "*to the first son of my said niece, Grace Pinnoek, and the heirs of the body of such first son, lawfully issuing;*" remainder to the other sons in like manner; "and for want of such issue male, then to the use and behoof of all and every the daughter and daughters of my said niece, Grace Pinnoek, begotten or to be begotten; and for default of such issue, then to the use of Richard Corbin, and the heirs of his body; and for default of such issue, to the use of the second son of Gawin Corbin, deceased, and the heirs of his body," with a proviso that the Corbins, on coming into possession, should take the name of Dakins.

The testator, by a former part of his will, devised an estate in Jamaica to his brother Philip for life; another estate to Grace Pinnoek, and the heirs of her body; remainder to Philip Pinnoek, her husband, in fee; another estate to Philip Pinnoek, in fee; another estate to Elizabeth Pinnoek, daughter of Grace, for life; remainder to trustees, to preserve, &c.; remainder to the heirs of the body of Elizabeth Pinnoek; remainder to the heirs-male of Grace Pinnoek, and their heirs, for ever; remainder to all and every the daughters of Grace Pinnoek, equally to be divided, and to the heirs of their bodies; remainder to Grace Pinnoek, for life; remainder to Philip Pinnoek, for life; remainder to the heirs of Grace Pinnoek. The residue of his real estate in Jamaica he devised to Philip Pinnoek, for life; remainder to Grace Pinnoek, for life; remainder to trustees, &c., with the same limitations *verbatim* as in the English estate, and the same proviso that the Corbins should take his name.

The testator died on the 1st of October, 1748, his brother Philip, and Grace Pinnoek, being then living. Philip Dakins entered upon the premises, and died on the 1st of May, 1749. Philip and Grace Pinnoek had issue a son, Dakins Pinnoek, who was born after the death of the testator, and three daughters; Elizabeth, who was born in the lifetime of the testator, and Mary and Grace, born after his decease. Dakins and Elizabeth died without issue in the lifetime of Philip and Grace Pinnoek. Grace Pinnoek, the mother, died on the 1st of August, 1769, and Philip Pinnoek, on the 1st of March, 1778. Mary Pinnoek, on the 1st of June, 1774, married James Dickson, and died *in the lifetime of her father, leaving Mary, the [*315] defendant, her only daughter and heir at law. Grace Pinnoek, the daughter married George Pinnoek, and is still living, and she and her husband are the lessors of the plaintiff. The said Grace Pinnoek, and Mary Dickson, the defendant, are the heirs at law of the testator, Henry Dakins.

[A question concerning the Jamaica estate having come on at the Cockpit, Lord LOUGHBOROUGH adjourned the cause, and directed the present ejectment to be brought for the English estate, in order to have the opinion of the Court of King's Bench.]

The case was argued in Trinity Term by *Graham* for the plaintiff, and by *Wilson* for the defendant.

Graham, for the plaintiff.—Grace Pinnoek and Mary Pinnoek, the daughters of Grace Pinnoek, took either estates for life, or estates for life with several inheritances in tail, with cross remainders. There are various cases which show that the words "for default of such issue" will not enlarge the life estate expressly given to Grace Pinnoek, the testator's niece. *Bamfield v. Popham*, Canc. 1702, 1 P. Wms. 54; *Barry v. Edgeworth*, Canc. 1729, 2 P. Wms. 523; *Loddington v. Kime*, B. R., E. 9 W. 3, Salk. 224; 1 *Ld. Raym.* 202; 3 *Lev.* 431, S. C. There is nothing unreasonable in sup-

posing that the testator meant to give life estates to the daughters. The presumption of law is in favor of such an interpretation; and if there is any doubt, the rule laid down in *Gath v. Baldwin*, Canc. 1755, 2 Ves. sen. 659, must prevail: that where the intent stands in *equilibrio*, on the face of the will, the Court is not warranted in taking away the benefit of the legal operation of the words. With regard to the second ground—if an estate of inheritance in the daughters is to be inferred, there is no reason for making it a tenancy in common: Courts of law used formerly to lean much to joint tenancy, but latterly, there being found to be no inconvenience in splitting estates, the leaning has been the other way. Still there is no case of an implication of a tenancy in common. *Fishe v. Wigg*, B. R., H. 1700, 1 P. Wms. 14. Here the will may be effectuated by holding that Grace and [316] Mary take an estate *in joint tenancy for life with several inheritances in tail, with cross remainders. *Litt. § 283. Cook v. Cook*, Canc. E. 1706, 2 Vern. 545.

Wilson, contra.—The devise to the unborn daughters of Grace Pinnock gave them estates tail. With regard to the testator's *intent*, no doubt can be entertained. It is true that, in general, there must be words of limitation in a will as well as in a deed; but where the intent is manifest, the Court will imply an estate of inheritance, without words of limitation, or anything like them. In *Gough v. Howard*, B. R., T. 12 Jac. 1, 3 Bulstr. 127; *CROKE, J.*, puts the case, where a man deviseth Blackacre to his eldest son and his heirs for his part or portion, and Whiteacre to his youngest son for his part (omitting heirs), yet here he shall have it in the same manner as the other hath Blackacre. This will is inaccurately penned, and several clauses show that the testator has used technical words without understanding their import. There is no case in which a limitation to an unborn child has been construed an estate for life. [BULLER, J.—In *Cook v. Cook*, and I think in *Goodwin v. Goodwin*, Canc. 1746, 3 Atk. 370, it was held that afterborn children should take for life.] It is manifest that it was the testator's intention that the whole line of Grace Pinnock should take, and that, without any *proviso*, for assuming his name. The relative *such*, after the limitation to the sons of Grace Pinnock, includes the daughters of sons. The words "sons" and "children" have been held to be words of limitation in a will. *King v. Melling*, B. R., M. 24 Car. 2, 1 Ventr. 225, 231; see ante, vol. ii. p. 433, (n); *Burchett v. Durdant*, Scaco. T. 2 W. & M. 2 Ventr. 211; *Robinson v. Robinson*, B. R., M. 30 Geo. 2, 1 Burr. 38; *Evans v. Astley*, B. R., M. 5 Geo. 3, 3 Burr. 1570; *Hodges v. Middleton*, B. R., T. 20 Geo. 3, ante, vol. ii. p. 431. The case of *Evans v. Astley* very nearly resembles this, but is even stronger. There the devise was "to every son and sons of the body of Charles Duckenfield, and for want of such issue," &c.; and this was held to give an estate tail to the sons of Charles Duckenfield, who should take successively. The case was decided on the whole scope and complexion of the will. The word *issue*, in the introduction to the next devise, is a [317] *general word applying to all descendants, and shows that the estate was not to go over until all the issue of Grace Pinnock had failed. Issue *male*, in the preceding clause, has the same meaning. [Lord MANSFIELD.—It is a word of reference. In the former clause it means for want of such sons.] It is evident, from the whole of the will, that the technical words to give an estate of inheritance to the daughters of Grace Pinnock have been left out by mistake; but the Court will supply them, as in the case of an estate to A, "and if he die without issue," which is a mistake of the same kind. With regard to the second point it cannot be supposed that the testator intended such a complicated devise. Very little is required to make a tenancy in common.

Lord MANSFIELD.—Nobody is counsel for the remainderman, who is ma-

terially interested in some of the questions. Let it stand for a second argument, and let the remainderman have notice that he may be heard.

Accordingly, in Michaelmas Term, the case was argued by the Solicitor-General *Mansfield* for the plaintiff, by *Pigott* for the defendant, and by *Bower* for the remainderman.

Mansfield, S. G.—The real question is, whether Grace Pinnock, the lessor of the plaintiff, the daughter of Grace Pinnock, and the sister of Mary, whom she survived, took the whole. The question arises on the devise to the daughters of Grace Pinnock, without words of limitation. The lessor of the plaintiff contends that, by that devise, she either took the whole herself for life, or that she and her sister took a joint estate for life, which by survivorship is now vested in herself. The will gives no estate tail to the daughters of Grace Pinnock; the words “for default of such issue,” after the devise to the daughters of Grace Pinnock, cannot mean the issue of those daughters, because no issue of such daughters have been mentioned. If the words of the will do not give an estate tail, is there anything in the will to show the intention of the testator, that the daughters of Grace Pinnock should take such an estate, and what kind of an estate is it to be, in tail male, female or general? The testator uses the same words in disposing of the Jamaica estate, and it is not probable that the mistake, if accidental, should occur twice. The circumstance that the Corbins are required to take the testator’s name, and the absence of *such a direction in the devise to the [*318] daughters, seems to show that the latter were not intended to take an estate of inheritance. At all events, even supposing an estate tail to be implied, still the daughters would take a joint estate for life. There are no words of severance, Litt. § 283, and therefore, though the inheritance may be several, the plaintiff is entitled to recover.

Pigott, for the defendant.—It is not necessary to go through all the cases that have been decided respecting the intention of testators, and the rules of law which have been deduced from them. It will be admitted that the intention of the testator must govern. From the whole scope and purview of this will, it is obvious that it was the intention of the testator that all the issue of Grace Pinnock should take before the estate went over. This general intention must prevail and overrule the subordinate intention. The testator’s brother, Philip Dakins, is first named, and then his niece, Grace Pinnock. The words “and for want of such issue male” give an estate in tail male to him, and the words “for default of such issue,” and the subsequent limitation, give her an estate in tail general, and take in all her issue female. Unless this be the proper construction of the will, the words “in default of such issue” must be rejected. Had the testator intended that the daughters of Grace Pinnock should take estates for life only, he would have limited such estates technically “for life,” as in other parts of the will. With regard to the tenancy in common, it must be admitted that, if the daughters took estates for life, it would be a joint estate, but if they took estates tail, it is more consonant to the intention of the testator to hold that they took in common. [Lord MANSFIELD.—The estates to the sons are in tail general, and to the daughters “for want of such issue male.” Now there was a son, and therefore the contingency has not happened. If the estate is limited after failure of issue male of that son, it would be too remote. This point has not been argued. Mr. *Pigott*’s argument is much too general.]

Bower, for the remainderman, said that he was not prepared to argue the point thrown out by the Court otherwise than that it would defeat the whole will. It is clear that it was the testator’s intent that the limitations subsequent to the first should take effect in some manner, and it is for the Court to say how. The only way to give the *remainderman an interest at present is to consider it an estate for life in common to the daugh- [*319]

ters. A presumption arises in favor of this construction from the testator's desire to continue his family name. The devise is to all and every the daughters, which would make a tenancy in common.

Mansfield, in reply.—It is not necessary to reject the words "for default of such issue; they mean the issue of Grace Pinnoek, the only person whose issue had been mentioned before. But those words cannot give Grace Pinnoek an estate for life in tail, because she has an express estate for life, with remainders to her sons and daughters, who all take by purchase. No case has been cited to show that this is a tenancy in common. Upon all the points hitherto agitated, it is clear that the daughters took estates for life. With regard to the point thrown out by the Court, the words "for want of such issue male" mean merely, on failure of the preceding limitations. If otherwise, the first son must take an estate tail; remainder to the other sons in tail; remainder to himself in fee, which is inconsistent with all the rest of the will. It must be construed in the same manner as if the limitations over were to strangers. It is a mere accident that these parties happen to be the heirs-at law of the testator, and that they will take on the limitations being void.

Lord MANSFIELD.—There is no case exactly like this, though it much resembles the case of *Doe v. Page*, ante, p. 294; decided last week. I think, in my own private opinion, that the whole difficulty arises out of a blunder, and that it was meant to follow the devise to the daughters with a limitation to the issue of the daughters, but the Court cannot supply words upon mere conjecture. I am inclined to adopt the construction that the daughters take in fee, a construction warranted by the former limitations. The limitations over are "for want of such issue male," which must mean son. According to the event, there was no want of a son, and therefore the contingency has not happened on which the devisees over are to take effect, and the latter limitations are at an end. This satisfies my conscience in the construction of so doubtful a will.

WILLES, Justice.—My opinion has varied several times. I am clear that the testator never meant that the Corbins *should take while there [320] was any issue of the daughters of Grace Pinnoek. The construction which destroys the remainders over on the birth of a son, would answer the testator's intent, which was, that the Pinnoeks should take first; but I cannot go that length, as there is no case on the point, and it may affect other cases. The estate to the daughters is a joint tenancy for life, with several inheritances. The lessor of the plaintiff is therefore by survivorship entitled to the whole for life. I think the words "for default of such issue" may in this case give an estate tail to the surviving daughter; but I do not give an express opinion on that question.

BULLER, Justice.—I have no doubt on any of the points. The will is a very embarrassed one, and on that I rely a good deal; for if a particular intention do not appear, the words must have their legal sense. With regard to the limitation to the daughters, as the estate is given to them without words of limitation it is only for life, and we are bound to say that the testator did not mean to give an estate tail, as it appears from other parts of the will that he knew how to limit such an estate. The estate is limited to the daughters "for default of such issue male." The rule is, that in wills, if such a construction can be made as to give effect to every word, they shall all stand. This will be done if we construe issue male to mean sons. Then the limitation to the daughters is an executory devise, and before the expiration of the estate tail, the event on which they were to take was to happen or not. It cannot be a remainder after the estate tail to the sons, because the event on which the daughters are to take might happen before the expi-

ration of the estate tail. The limitations over are all void, and the daughters are entitled to moieties in fee.

Judgment for the plaintiff for one moiety, and for the defendant for the other moiety.¹

¹ See *Doe dem. Dacre v. Dacre*, C. B., E. 88 G. 3, 1 B. & P. 250; S. C. in Error, P. T. R. 112; *Doe dem. Cumberbach v. Perryn*, B. R. M. 30 G. 3, 3 T. R. 484; *Lewis dem. Ormond v. Waters*, B. R. E. 45 G. 3, 6 East, 336; *Foster v. Romney*, B. R., M. 50 G. 3, 11 East, 594; *Goodright dem. Lloyd v. Jones*, B. R., E. 55 G. 3, 4 M. & S. 88.

"The uniform language of the Courts, in every case where questions of this nature have been agitated, is adverse to the contingent construction. In opposition to this train of adjudications there appears to be only one authority which can be *adduced for giving to the words, 'for default of such issue,' the effect of ren- [*321] dering the posterior limitations dependent on the event of no object of the preceding limitations ever coming into existence. This is *Keene dem. Pinnock v. Dickson*, which arose upon limitations (after certain estates for life) to the first and other sons of A., successively in tail general, and for want of such issue male, to all and every the daughter and daughters of A., thereafter to be begotten, and for default of such issue to B. in tail, and in default of such issue to C. in tail;—and the question argued was, whether the daughters took an estate for life or in tail; but Lord MANSFIELD's opinion was, that as there had been a son of A., the estate of the daughters never arose, and therefore they (being the testator's co-heiresses) were entitled by descent, which, he observed, would effectuate the intention, as the omission of words of inheritance was evidently a blunder. This decision is at variance with, and is clearly overruled by, the several subsequent cases before cited. It was said by Mr. Justice BAYLEY in *Goodright v. Jones*, not to have been followed in *Doe v. Dacre*, and the determination of the Court in *Goodright v. Jones* has deprived it of even the shadow of authority. In *Pinnock v. Dickson* the doctrine indeed seems to have undergone no discussion, but was evidently (as appears from the close of the judgment) caught at by Lord MANSFIELD as a scheme for securing the property to the nieces and co-heiresses of the testator (who must otherwise have been excluded by strangers, or more remote relations); and the case may be ranked among those in which that eminent judge allowed considerations of such a nature to exercise an undue influence over his mind, disregarding the mischief of shaking general rules." *Haye's Principles for expounding the Dispositions of Real Estate to Ancestor and Heirs in Tail, &c.*, p. 89. The above observations are confirmed by the present report of the principal case, from which it appears that the point as to the contingency was never argued at the bar, and that Lord MANSFIELD's opinion was expressly dissented from by Mr. Justice WILLES.

DAVID BARCLAY, SILVANUS BEVAN, and AMBROSE BENNIG
v. JOHN LUCAS.¹ Nov. 21.

The defendant entered into a bond to the plaintiffs, reciting that the plaintiffs at the recommendation of the obligor had agreed to take P. J. into their service and employ, as a clerk in their shop and counting-house, and the condition was, that if P. J. should faithfully account for, &c., to the plaintiffs all such sums as he should receive in the service of the plaintiffs then, &c. The plaintiffs afterwards took R. B. as a partner into their business. Held, that the defendant was liable for money embezzled by P. J. after the new partnership.

THIS was an action of debt on bond. The defendant prayed oyer of the bond and condition. The bond was from *the defendant and one [*322] John Philips for £500, dated 23d February, 1779.—The condition recited, that the plaintiffs at the recommendation of the obligors had agreed to take Philip Jones into their service and employ, as a clerk in their shop and counting-house, and the obligors had agreed to become security for his fidelity, as far as £500 each, and the condition was, that if Philip Jones

¹ S. C. 1 T. R. 291 n.

should faithfully account for, pay, &c., to the plaintiffs all such sums of money, &c., as he should at any time receive, or be intrusted with in the service of the said plaintiffs, and should not embezzle, &c., then, &c.

The defendant pleaded, 1. *Non est factum*; 2. That the plaintiffs, on the said 23d day of February, 1779, carried on the business of bankers as copartners, in their own names only, and for and on their own account, and without any other partner, and continued so to do till the 24th of June, 1780. That the service in the condition mentioned, was meant and intended to be performed to the plaintiffs in the trade of bankers so carried on by the plaintiffs only, and not in partnership with any other person. That the plaintiffs, on the day and year last-mentioned, entered into partnership with one Robert Barclay, and continued in partnership with him from thence hitherto, and have during all that time carried on the trade in the joint names of the plaintiffs and the said Robert Barclay. That Philip Jones entered into the service of the plaintiffs on the said 23d of February, 1779, and continued till the partnership with Robert Barclay, viz., till the 24th of June, 1780, and then quitted the service of the plaintiffs, on their own separate account, and afterwards, on the same day and year, entered into the service of the said plaintiffs and Robert Barclay. That Philip Jones, during all the time he remained in the service of the plaintiffs, did well and faithfully account, &c. 3d plea, That Philip Jones entered into the service of the plaintiffs on the 23d of February, 1779, and continued in the same till the 24th of June, 1780, and then quitted the service of the plaintiffs; and that, during all that time, &c. To the second plea, the plaintiffs replied (protesting that the service was not meant and intended to be performed in the trade carried on by them only) that the service was meant and intended to be performed to them in the business so then carried on by them during all the time they should [*323] continue the same business, and the said Philip Jones *should continue to serve therein. That on the 24th of June, 1780, they did admit into partnership in their said trade, and in the same house wherein they exercised it at the time of making the said writing obligatory, the said Robert Barclay; and the said Robert Barclay, by such admissions, became possessed and entitled to one-fourth share of the said trade, and hath so continued. That Philip Jones, on the 23d of February, 1779, entered, &c., and continued in the service of the plaintiffs till the said partnership, and from that time till the 16th of February, 1781, and was not during all that time discharged. That after the said partnership, and while Philip Jones so continued in his said service, viz., the 16th of February, 1781, he received, in his said office and employment, of one Mark Groves, £20. 16s., three-fourths of which, viz., £15. 12s., was received by him, Philip Jones, on account of the plaintiffs, and which sum the said Philip Jones was afterwards requested to pay, &c.—To the third plea, the plaintiffs replied that the said Philip Jones did not quit the service of the plaintiffs from the 23d of February, 1779, until and upon the 16th of February, 1781, and did not during all that time once quit the same, and that after, &c., and whilst, &c., viz., on the said 16th of February, 1781, the said Philip Jones, as clerk of the said plaintiffs, did receive £15. 12s., on account of the said plaintiffs, &c.—To the first replication, the defendant rejoined (protesting that the service was not meant to be performed as in the replication mentioned, protesting also that the plaintiffs did not take the said Robert Barclay in partnership in their said trade, and in the same house to a fourth part, &c.); that after the partnership, all the moneys received by the said Philip Jones, in his said office and employment of clerk to the plaintiffs and Robert Barclay, were received by him on the joint account of the plaintiffs and Robert Barclay as copartners, and traverses the receipt of three-fourths of the money in the replication

mentioned by Philip Jones on account of the plaintiffs. To the second replication, the defendant rejoined, that Philip Jones did quit the service of the plaintiffs in manner and form on which issue was joined. The plaintiffs, to the first rejoinder, surrejoined that Philip Jones did receive the said three-fourths of the said sum of money on account of the said plaintiffs; on which issue was joined.

*The cause was tried before Lord MANSFIELD, at Guildhall, after last term, when the following case was reserved: [*324]

That the bond stated in the declaration is the deed of the defendant. That, on the 24th of June, 1780, Robert Barclay was taken into partnership with the plaintiffs. That, on the 16th of February, 1781, Philip Jones, the clerk mentioned in the condition of the bond, received of Mark Groves £20. 16s., on account of the new partnership, and has not paid it over to the plaintiffs, or to the new partnership, or any of them. The question for the opinion of the Court was, whether the defendant is liable to the plaintiffs in this action?

Chambre, for the plaintiffs.—The 'substantial question is, whether, by taking a new partner, the defendant is discharged, or at least whether he is discharged to the extent of the new partner's share. No doubt would be entertained if the question were stated to persons not educated as lawyers. It is a question of indemnity, and the intention of the parties must be regarded, and whether the plaintiffs have sustained any damage. If the case of *Wright v. Russell*, C. B., H. 14 Geo. 3, 2 Blackst. 954; 3 Wils. 530, S. C., had not occurred, this question could never have been made. But it is not necessary to inquire into the merits of that decision, for the grounds of it do not apply in the present case. It proceeded on the ground that it was an attempt to make the defendant responsible for the property of another, for which he had not engaged, and it also proceeded in part on the form of the breach. The present question is not to be determined by the technical rules which govern joint and separate property, or the forms of actions; it must be decided by the intention of the parties. The two cases¹ relied upon in *Wright v. Russell* do not apply here. Here there has been a breach of the bond. Jones was not faithful in his service, and it has been as injurious to the plaintiffs as if the property had been separate. It would cause great inconvenience if, on the accession of a new partner, it were necessary to change all the sureties.

Baldwin, contra.—There is no material distinction between the present case and that of *Wright v. Russell*. On *the reason of the thing, [*325] also, it would be very inconvenient if a man were to be bound for all the trades and partnerships which the obligees might engage in. There is no hardship in requiring that the obligees should send for the sureties, and inquire whether they were willing to continue. The property here is joint, the embezzlement is of the joint property, the injury is to the plaintiffs and Robert Barclay jointly. How, then, can three of the partners alone maintain the action?

Lord MANSFIELD.—The question turns, as Lord Chief Justice DE GREY observes, in the case which has been cited, upon the meaning of the parties. In endeavoring to discover that meaning, the subject-matter of the contract is to be considered. It is notorious that these banking-houses continue for ages with the occasional addition of new partners. In such establishments, clerks are necessary, who now and then succeed as partners, an arrangement very proper and very beneficial to the clerks. The house requires security for their honesty. Now it seems to me to make no difference whether a new partner is introduced or not, for there is no doubt that it is a security to the

¹ Lord Arlington v. Merricke, 24 Car. 2, 2 Saund. 412; Horton v. Day, cited 2 Saund. 414; All. 10, *nomine* Haughton v. Day.

house. I am glad that there is a distinction between this case and that decided in the Common Pleas; for I think that the plaintiffs are entitled to recover to the extent of the whole sum embezzled, or at all events to the extent of their own share.

WILLES, Justice.—I am of the same opinion. The intention of the parties must be looked for in the condition of the bond. The recital there is, "in their shop and counting-house," not in their particular service. Great inconvenience would arise if it were otherwise. The surety runs no greater risk after the accession of the new partner than before. He is not bound for the servant's obedience to the new master, but only for his honesty.

BULLER, Justice.—I cannot agree to the doctrine laid down in *Wright v. Russel*; but supposing that case rightly decided, it does not apply here, for the demand is confined to the plaintiff's share. What my Lord says is decisive. The security is to the house. Lord Chief Justice, DE GREY says that it is the plaintiff's own act, but if the plaintiffs had covenanted to employ the clerk for a certain time in their shop, could he not maintain an action, and compel them to employ him still? Then if the contract remains on one *side, it must on the other. I agree that the bond would [*326] not extend to a new trade, because it is only for the clerk's fidelity in that particular trade. It is not confined as to the extent of that trade, otherwise it would be very inconvenient, and a man could never increase his trade.

Postea to the plaintiffs.¹

¹ The principle of the cases, respecting the continuing liability of sureties, is the intent of the parties as collected from the instrument. In general, where the security is given to one person, or to a firm, and there are no circumstances which indicate the intention of the parties that it should be a continuing security, in case of the accession of a new partner, or the death of the party, or of one of the parties, to whom the security was given, it will, on such death or accession, become inoperative. *Bodenham v. Purchas*, B. R., M. 59 Geo. 3, 2 B. & A. 39; *Strange v. Lee*, B. R., E. 48 Geo. 3, 3 East, 484; *Barker v. Parker*, B. R., T. 26 Geo. 3, 1 T. R. 287; *Weston v. Barton*, C. B., M. 53 Geo. 3, 4 Taunt. 673. So where A. became bound to B., under condition that C. should truly account to B. for all sums of money received by C. for B.'s use, and C. afterwards, with B.'s knowledge, took D. as his partner; Lord ELLENBOROUGH ruled that the guarantee did not extend to sums of money received by C. for B.'s use, after the formation of the partnership. *Bellasis v. Elsworth*, 8 Campb. 58. So where the obligor was bound for the fidelity of A. to B. C. and D., a voluntary society, and that society was afterwards incorporated, it was held that the obligor was not liable for fidelity to the corporation. *Dance v. Girdler*, C. B., E. 44 Geo. 3, 1 B. & P., N. R. 34.

But where, as in the principal case, there appears to be an intent that the security should be a continuing one, as where there are expressions importing that the clerk is to serve the firm, and not the individuals who compose it, the obligor will not be discharged by a change in the parties interested in the concern. Thus, where a bond was given to seven persons as trustees of the Globe Insurance Company, conditioned for the faithful service of A. B. "during his continuance in the service of the said company," it was held the obligor was liable notwithstanding the intermediate changes of the original holders of shares in the company by death and transfer. *Metcalf v. Bruin*, B. R., E. 50 Geo. 3, 12 East, 400; and see *Kipling v. Turner*, B. R., M. 2 Geo. 4, 5 B. & A. 261.

Many cases have also arisen upon these securities with regard to the time at which they expire. See *Liverpool Waterworks v. Atkinson*, B. R., T. 45 Geo. 3, 6 East, 507. *St. Saviour, Southwark v. Bostock*, C. B., E. 46 Geo. 3, 2 Bos. & Pul. N. R. 175; *Hassel v. Long*, B. R., H. 44 Geo. 3, 2 M. & S. 363; *Sansom v. Bell*, 2 Campb. 39.

It may be doubtful whether, since the more recent decisions, the principal case [*327] can be sustained. In *Strange v. Lee*, *Lord ELLENBOROUGH says, "With a small shade of difference in *Barclay v. Lucas*, where some expressions occur which may, perhaps, be difficult to reconcile with other authorities, I consider this question concluded by the cases of *Arlington v. Merricke*, *Wright v. Russel*, and *Barker v. Parker*. It may be observed, however, that, in *Barclay v. Lucas*, the words were different from the present case; the clerk was to be taken into the service of

the obligees as a clerk in their shop and counting-house, which might be supposed to mean the same house, however the individual partners might change." In *Dance v. Girdler* (1 Bos. & Pul., N. R. 42) MANSFIELD, C. J., says, "The last case of *Strange v. Lee* decides this point most clearly. And I mention that case, because one cannot deny that it only differs in words from the case of *Barclay v. Lucas*." So, in *Weston v. Barton* (4 Taunt. 681), the same Judge observes, "This, then, being the construction of the instrument from almost all the cases, in truth, we may say from all (for though there is one adverse case of *Barclay v. Lucas*, the propriety of that decision has been much questioned), it results that where one of the obligees dies, the security is at an end." It may, however, be remarked, that the principal case was not considered by Lord ELLENBOROUGH to have been overruled by *Strange v. Lee*, and is cited by him in *Metcalf v. Bruin*, (12 East, 407), for the principle upon which it professed to proceed, viz. the intent of the parties at the time of entering into the contract to provide for a service to a changeable body carrying on the same concern.

The KING v. The Inhabitants of LITTLE BOLTON. Nov. 22.

(Reported, CALDECOTT, 367.)

The KING v. CHARLES BEMBRIDGE. Nov. 22.

A public officer is indictable for misbehavior in his office.

THIS information contained three counts. The first stated that Henry Fox, afterwards Lord Holland, was appointed receiver and paymaster-general of the forces, 26th July, 1757, and continued till the 11th June, 5 Geo. 3, and as such received and paid divers sums of money. It then stated the succession of paymasters from Lord Holland down to Colonel Bane, and charged "That the place and employment of accountant in the said office and place of receiver and paymaster-general, during all the time heretofore mentioned, was a place and employment of great public trust and confidence, touching the making up the accounts *of the receiver and paymaster-general, and the adjusting and settling the same with [*328] the auditor of the imprest."

That the accounts of Lord Holland were, 11 January, 12 Geo. 3, made up by John Powell, Esq., then being accountant in the said office, and delivered to the auditors of the imprest, part to W. Aislaby, Esq., one of the auditors, and the residue thereof, including the final account of the said Lord Holland, to Lewis, Lord Sondes, the other auditor, in order to be adjusted, settled, and passed, according to the ancient course of the exchequer. That divers sums of money ought to have been inserted in the said accounts as charges of the said Henry, Lord Holland, that is to say (enumerating several sums received by different persons under the authority and for the use of Lord Holland as paymaster, several other sums retained by Lord Holland on different accounts, and two sums, amounting to £9,500 and odd, being profit of remittances made by Lord Holland to Peter Taylor, Esq., deputy-paymaster of the forces in Germany), which said sums were omitted. That after the delivery of the said accounts to the auditors, and before the said final account was adjusted and settled by Lord Sondes, viz. 31st March, 16 Geo. 3, Charles Bembridge, Esq., became and was accountant in the office and place of receiver and paymaster-general. That the said final account continued open and unsettled for a long time after the said Charles Bembridge became, and whilst he was, accountant, viz. for six years. "That it was the duty of the said Charles Bembridge, as accountant as aforesaid, to disclose and make known to the said Lewis, Lord Sondes, any charges upon

the said Henry, Lord Holland, as such receiver and paymaster-general as aforesaid, which had been omitted to be inserted in the said accounts."

That whilst the said final account remained open and unsettled, the said Charles Bembridge was at divers times requested by the said Lord Sondes, to discover to him any charges on the said Lord Holland, within the knowledge of him the said Charles Bembridge, which ought to have been inserted in the said accounts, and had been omitted. That the said Charles Bembridge, when he was so requested, well knew the said several sums of money hereinbefore mentioned were not included therein, but were omitted to be inserted in the said accounts as charges on the said Lord Holland. That the said

[*329] Charles Bembridge, being such *accountant as aforesaid, wrongfully, unjustly, and fraudulently contriving to conceal from the said Lewis, Lord Sondes, the said auditor of the imprest, to whom the said final account was delivered as aforesaid, the said several sums of money which ought to have been charged as aforesaid, and to cheat and defraud our said present Sovereign Lord the King, did not, at the several days and times when he was so requested as aforesaid, discover or make known to the said Lewis, Lord Sondes, the several sums of money, which, &c., but wickedly, wilfully, fraudulently, knowingly, and corruptly did refuse and neglect to discover or make known the same to the said Lewis, Lord Sondes, and did permit and suffer the said Lewis, Lord Sondes, to proceed to close the said final account of the said Henry, Lord Holland, without the said sums of money having been brought into the same, or made known to the said Lewis, Lord Sondes, contrary to the duty of the said Charles Bembridge, as such accountant as aforesaid, to the evil example, &c.

The second count did not state the succession of paymasters, nor the general duty of the accountant, and stated that divers sums of money (enumerating them without any particulars concerning them) ought to have been included, and were omitted. Having before stated that the accounts were made up by John Powell the accountant, it then stated the appointment of the defendant, in the same words as in the first count: that it was his duty, as accountant as aforesaid, forthwith to disclose and make known to the said Lord Sondes any omission out of the said account of charges made upon the said Henry, Lord Holland, within the knowledge of him the said Charles Bembridge. It then stated the request, and neglect, and refusal as in the first count.

The third count stated that Henry, Lord Holland, in his lifetime was paymaster; that after he went out of office, viz. 11th January, 12 Geo. 3, his final account was made up by John Powell, then being accountant, and delivered to Lord Sondes; that afterwards, and after the death of Lord Holland, Charles Bembridge became accountant in the said office; that the final account remained open and unsettled at that time, and for six years, while the said Charles Bembridge was accountant; that it was the duty of the said Charles Bembridge, as such accountant as aforesaid, forthwith to have discovered and made known to the said Lewis, Lord *Sondes, any [*330] charges omitted in the said final account of the said Lord Holland, or any other account of the said Lord Holland, as such receiver and paymaster-general, which had not been brought into or inserted in the said final account, or any other account, delivered to the auditors of the imprest, or either of them, within the knowledge of him the said Charles Bembridge; that divers sums of money (enumerating them) which ought to have been inserted in the final or some other account, were omitted; that the said Charles Bembridge, whilst he was accountant, well knew that the said sums ought to have been inserted in the said final account, or in some other account of Lord Holland, as paymaster, delivered to the auditors or either of them.

Yet the said Charles Bembridge did not forthwith discover or make known to the said Lewis, Lord Sondes, the said omissions or any of them, as it was his duty, as such accountant as aforesaid, to have done, but wickedly did withhold the said information, &c.

The information was entitled of Easter Term, 23 Geo. 3. In Trinity Term following the defendant pleaded not guilty, and the information was tried before Lord MANSFIELD at Westminster after Trinity Term, when the defendant was found guilty generally.

Bearcroft, Scott, Erskine, and Adam moved in arrest of judgment, or for a new trial,¹ and *Lee, A. G., Sir T. Davenport, Cowper, Wilson, and Baldwin* showed cause. As the arguments are noticed in the judgment of Lord MANSFIELD, they are omitted in this place.

LORD MANSFIELD.—Though the principles upon which this prosecution is founded may be old, the specific application *of them is new, and it is therefore important to the defendant, and to the public, that the [*331] evidence and the law should be accurately understood. There are two motions depending—in arrest of judgment, and for a new trial. The new trial is moved for on two grounds; first, that the second and third counts are bad; and, secondly, that the verdict is against evidence. With regard to the first objection, I am not satisfied that the counts are bad; but whether they are so or not is immaterial, because the Court is guided by the report of the Judge who tried the cause, and my direction and the verdict went both on the first count. The others were not thought of. The second, and the material objection, is as to the sufficiency of the evidence to maintain the verdict. It is said for the defendant, that two things are to be made out: first, that it was an office of trust, touching settling with the auditors; and, secondly, that the defendant in his office knowingly, and contrary to his duty, concealed, &c. Both of these must certainly be made out. As to the first—no money passes through the hands of the accountant, his office concerns the accounts of others; there is no written constitution; what his duty is can only be learned from what he has always done. [His Lordship then stated the evidence as to this point.] Another doing the business occasionally is no answer, unless that other had received the fees. Then it is said that he was not able to compel production of the accounts. That might have been an objection if he had been prosecuted for not adjusting the accounts. The process would then go against the paymaster, and he would be compelled to produce them. The duty of the defendant is obvious; he was a trustee for the public and the paymaster, for making every charge and every allowance he knew of; he saw that all the annual accounts had been given in and attested, and that articles antecedent to those attested accounts had been omitted. It is impossible to justify Powell in making those attestations. If the defendant knew of the omission, he must have applied to Powell for explanation; and if he concealed it, his motive must have been corrupt. That he did know was fully proved, and he was guilty therefore, not of an omission or neglect, but of a gross deceit. The object could only have been

¹ On Saturday the 8th November, Lord MANSFIELD at the rising of the Court said, that understanding that a new trial was to be moved for on behalf of the defendant, and Monday being the last day of moving, he thought it proper to give notice that the Court would not hear a motion for a new trial for a defendant convicted of a misdemeanor, unless he were present in Court; that sometimes the personal appearance had not been insisted on, either by consent or because it has been overlooked; but the Court had considered it, and found the rule to be fully established, and it ought to be adhered to. *Bearcroft* said, that having received notice from the Solicitor-General that the strict rule would be insisted on, he had looked into the cases, and could not contend that the rule was not as Lord MANSFIELD had stated it. The defendant accordingly appeared in Court.

to defraud the public of the whole, or of part of the interest. On the whole I have no doubt but that there was sufficient evidence on both grounds.

[*332] *As to the motion in arrest of judgment the objection is, that this is a civil injury, and not indictable, and it is said that there is no precedent. The law does not consist of particular cases but of general principles, which are illustrated and explained by these cases. Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehavior in his office; this is true, by whomever and in whatever way the officer is appointed. In Vidian's Entries, p. 213, there is a precedent of an indictment against the *Custos Brevium* for losing a record. Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country. An indictment has been sustained for concealing public money, 27 Ass. pl. 17, though this, as against a private person, would only have been actionable. The rule is well laid down by Mr. Serj. Hawkins, Book ii. c. 25, s. 4, that all kinds of crimes of a public nature, all misdemeanors whatsoever of a public evil example against the common law, may be indicted; but no injuries of a private nature, unless they some way concern the King. So it is laid down in an anonymous case, B. R. H. 2 Ann. 6 Mod, 96, that any public officer is indictable for misbehavior in his office. No doubt the offices concerning the revenue are of great importance to the public. I am therefore of opinion, that both the rules ought to be discharged.

WILLES and BULLER, Justices.—Of the same opinion.

WILLES, Justice, then pronounced the judgment of the Court, which was six months' imprisonment, and a fine of £2,650, (the sum received by the defendant for making up the accounts.)

¹ In the course of the argument, the case of Peter Leheup, Esq. was cited, which was an information tried at bar in Hilary Term, 28 Geo. 2.

The defendant and three others had been appointed receivers and managers of a lottery called the Museum lottery, under stat. 26 Geo. 2, c. 22, for the purpose of raising a sum of money for the establishment of the British Museum. The act directed that the subscriptions for the Lottery should be received publicly, from such a time to such a time, after notice in the Gazette, and that no person *should [*333] subscribe for more than twenty tickets. The information was for receiving subscriptions privately before the time appointed, and by fictitious names giving a greater number of tickets to one person, and other evasions of the statute. There were ten counts, all concluding in open violation of the said act of Parliament, and contrary to the form and effect thereof. They all charged the offence to be contrary to the duty of his said office of receiver. The defendant was found guilty on several counts.

HISKUYSON v. WOODBRIDGE. Nov. 25.

(Reported, ante, vol. i. p. 166, note [† 55.])

The KING v. The Inhabitants of EDISORE, otherwise HEDSOR. Nov. 26.

(Reported, CALDECOTT, 871.)

BINGLEY v. MALLISON and Another.¹ Nov. 26.

A bill of exchange drawn by a bankrupt before his bankruptcy, but not endorsed to the petitioning creditor until after the act of bankruptcy, is a good petitioning creditor's debt.

THIS was an action of trover brought by the plaintiff against the defendants, who were assignees of a bankrupt. The cause was tried at York, before EYRE, B., and the only question was upon the petitioning creditor's debt. The debt consisted of a bill of exchange given by the bankrupt before his bankruptcy. The bill was made in January, 1782, became payable in June, and was endorsed to the petitioning creditor in November. The act of bankruptcy was committed in October. EYRE, B., was of opinion that this was not a sufficient petitioning creditor's debt to support the commission, and a verdict was found for the plaintiff for the value of the goods. A rule having been obtained to show cause why there should not be a new trial,

Lee, A. G., Davenport, and Hotham, showed cause. This rule was granted on the authority of two cases, *ex parte Thomas*, Canc. 1747, 1 Atk. 73, and an anonymous case in *Wilson, C. B.*, T. 1 G. 3, 2 Wils. 135. [*334] The first case was a petition of the bankrupt himself, and the Chancellor might refuse to supersede the commission, where there were many creditors, and a clear act of bankruptcy. The latter is a very short note, and the case does not appear to have been argued. It may, therefore, be considered that there is no express decision on the point; and the reasoning of the Court, in several cases, is against the validity of the debt. *De Golds v. Ward*, 1 Br. P. C. 536; *Ex parte Lee*, Canc., H. 1721, 1 P. Wms. 782. Every act of bankruptcy is supposed in law to be a fraud upon the petitioning creditor, as well as upon every other creditor, but how could it be a fraud upon this man who had no debt existing at the time? The bankrupt could not mean to delay or to defeat him. Put the case, which indeed was the fact here, that the holder of the bill is indebted to the bankrupt in a large sum of money, and cannot, therefore, himself sue out a commission: shall he be allowed, by endorsing the bill, to confer that right on another? By the statute, 34 and 35 H. 8, c. 4, § 1, the Chancellor has authority to grant a commission of bankrupt upon complaint made by any parties grieved; but the petitioning creditor, in this case, was not a party grieved, for he had no debt at the time of the bankruptcy. It has been held that where a note is endorsed after the act of bankruptcy, the holder cannot make it the subject of a set off, *Marsh v. Chambers*, B. R., T. 18 G. 2, 2 Str. 1235, and the same rule ought to hold with regard to a petitioning creditor's debt. By this contrivance, a creditor for less than £100 might have, by an endorsement, the means of taking out a commission.

Lord MANSFIELD (stopping *Arden*).—This seems to me a very clear case. A bill of exchange is made, which is due before the act of bankruptcy, and is endorsed before the commission taken out. The case stands clear of all circumstances of fraud. An endorsement of a bill of exchange is a case in which the law allows an assignment of a chose in action. No new debt is created, but the old debt is transferred, and the endorsee stands in the place of the original payee. The endorsee always came in under the commission, *because he came in on the ground of the original debt. Thus it stands upon principle, and the cases are positive, and of the highest [*335] authority.

BULLER, Justice.—This case does not go the length Mr. *Hotham* supposes. I take it to be clear that you cannot, by joining two notes for less

¹ S. C., cited 1 Cook's B. L., 34, 8th edit., nomine *Bingley v. Maddison*.

than £100, make a man a petitioner who would not be one otherwise. But this is a note for £100.¹ Rule absolute.²

¹ There is some obscurity in the judgment of BULLER, J. In Mr. J. LE BLANC's MSS. it runs thus: "this is for a note of £100, and differs from a note of £50, when at the time of the act of bankruptcy there was no subsisting debt on which a commission could issue. When that case happens it would make another question." In the argument in *Glaister v. Hewer*, B. R., 38 G. 8, 7 T. R. 490, Mr. J. BULLER is stated to have said in this case, "that if two creditors had each of them bills for £50 on the bankrupt at the time of his bankruptcy, they could not by a subsequent indorsement from one to the other make a petitioning creditor's debt of £100." Upon which Lord KENYON remarked, "that he could not accede to what was supposed to have been said by J. BULLER in the case of *Bingley v. Maddison*."

² See *Ex parte Douthat*, B. R. M. 1 G. 4, 4 B. & A. 67.

SPRING dem. *TITCHER v. BILES* and Another. Nov. 26.

(Reported, 1 T. R. 435, (n).)

DUNN v. LARGE. Nov. 26.

In trespass for mesne profits after ejectment for the recovery of a house used as an inn, the plaintiff cannot recover the loss which he has sustained by the defendant shutting up the inn, and destroying the custom, unless such damage be specially stated in the declaration.

TRESPASS for the recovery of mesne profits after judgment in ejectment. The declaration was in the usual form, that the defendant broke and entered the premises, and stayed and continued therein, and ejected the plaintiff, and kept him out of possession, and during that time took the profits to himself, whereby the plaintiff, during that time, lost all the issues and profits thereof, [*336] and was put to great expense *in recovering possession. The defendant pleaded not guilty. The cause was tried at the Summer Assizes, at Bury, when the plaintiff, after proving the judgment in ejectment and writ of possession, and the value of the rent during the time he was kept out of possession, and the costs of the ejectment, to the amount of above £70, offered to give in evidence other special damage, viz., that the defendant had been tenant to the lessor of the plaintiff for a term, and refusing to go out at the expiration of the term, the lessor of the plaintiff was obliged to recover possession by ejectment; that the demised premises consisted of an inn at Brandon, in Suffolk, which if the defendant had quitted, as he ought to have done, at the end of his term, the lessor of the plaintiff could have sold for £800; that the defendant, during the time he had held over and pending the ejectment, had shut up the inn, and stationed a person there to direct travellers to another inn, which the defendant had taken in the same town, and by that means drew away the custom, so that, by the time the plaintiff recovered possession in the ejectment, the inn would not sell for more than £500. HOTHAM, B., who tried the cause, refused to receive this evidence, because it was not specially stated in the declaration. A verdict having been found for the plaintiff for £70 only, a new trial was now moved for, on the ground that the evidence had been improperly rejected by the learned Judge; but the Court was of opinion that he had acted correctly, and refused a rule to show cause.

BOVARA v. BESSESSTI.¹ Nov. 27.

The Court will not discharge on common bail a defendant held to bail on a Judge's order, granted upon the copy of an affidavit of the debt made at Hamburg, authenticated by the magistrates of that city, and corroborated by the affidavit of persons here, to the credit of the party making the affidavit.

THE defendant was held to special bail by an order of a Judge at chambers, upon an affidavit of the debt made at Hamburg, a copy of which had been sent over, authenticated by the magistrates of Hamburg, under the seal of the burgomaster. There was also an affidavit from persons in this country, who swore to their knowledge of the creditor *at Hamburg, [*337] that he was a man of credit, and that they believed the contents of his affidavit.

Sir T. Davenport having obtained a rule to show cause why the defendant should not be discharged on filing common bail,

T. Couper showed cause.

Lord MANSFIELD.—Before the statute 12 G. 1, c. 29, every person might hold to bail for any sum; but by that act an affidavit is required. Before the statute any man might be held to bail by order of a Judge, and that authority remains as before. I have known many applications of the same sort on certificates from consuls abroad. The precise form of the authentication I do not remember. This is a certificate from abroad of the affidavit having been made before a magistrate.

WILLES, Justice.—My doubt is, because the original affidavit is not sent over, as is always done in the case of affidavits made in Ireland,² to hold to bail here.

BULLER, Justice.—If the affidavit were sent over, it could be of no use here. It is right that it should be left abroad, because, if it be false, it is a perjury there, and not here.

Rule discharged.

¹ S. C. cited 1 Tidd's Pr. 165, 8th ed.

² See stat. 55 G. 3, c. 157, for empowering the courts of law and equity in Ireland to grant commissions for taking affidavits in all parts of Great Britain.

The KING v. FREEMAN ECCLES and Others. Nov. 26.

Indictment stated that defendants intending unlawfully, &c., and by indirect means to impoverish H. B. and to hinder him from using his trade, &c., unlawfully conspired, &c., by indirect means to impoverish H. B. and to hinder him, &c.; held good. Indictment against F. E. and six others. The issue stated, "And now, that is to say, on, &c., cometh the said F. E. and others, by H. D. their attorney, and having heard the said indictment read, they say, and each of them severally says, that they are not guilty thereof, &c.," after verdict of guilty held sufficient.

THIS was an indictment for a conspiracy, found at the borough sessions of Liverpool, in the county palatine of Lancaster, and removed into this court. It was tried before BULLER, J., at the last Lancaster assizes.

The indictment stated that Freeman Eccles and six others, devising and intending unjustly, unlawfully, and by indirect means to impoverish one Henry Booth, and to reduce to beggary and want the said Henry Booth, and to hinder and *deprive the said Henry Booth from using and exercising his trade and business of a tailor, which he then and there [*338] used and exercised, on the 28th November, 23 G. 3, the said Freeman Eccles (and the six others) wrongfully, fraudulently, maliciously, and unlawfully did confederate, conspire, combine, and agree amongst themselves, by indirect means, to impoverish the said Henry Booth, and to deprive and hinder him from following and exercising his aforesaid trade or business of a tailor;

and the said Freeman Eccles, &c., in pursuance of and according to the unlawful conspiracy, combination, and agreement aforesaid, on the said 28th of November, indirectly, wrongfully, unlawfully, maliciously, and unjustly did prevent and hinder the said Henry Booth from following his aforesaid trade or business in Liverpool aforesaid, and thereby did then and there greatly impoverish the said Henry Booth, to the great damage, &c. The indictment contained another count not materially different.

The issue was joined in the following manner:—And now, that is to say, on Friday, next after the morrow of the Holy Trinity, in this same term, before our said Lord the King, at Westminster, cometh the said Freeman Eccles and others, by H. D., their attorney, and having heard the said indictment read, they say, and each of them severally says, that they are not guilty thereof, &c.

The verdict was taken against Eccles and five of the others, and there was no finding at all as to the sixth.

Chambre now moved an arrest of judgment, and took two objections to the indictment. 1. The charge is too general; there are no particular facts mentioned on which the defendants might have prepared to defend themselves. The indictment should have stated a particular act, and have charged the conspiracy to have been with a view to that act; but nothing more than the consequence of the act is stated, which is too general. *Hawk. P. C. b. ii. c. 26, s. 59.* A conspiracy is certainly indictable, though no act be done; but still the act intended to be done must be stated. There is no case of authority that a general charge of a conspiracy to injure is good. *The King v. How, B. R., E. 12 G. 1, 1 Str. 699, The King v. Munoz, B. R., H. 13 G. 1, 2 Str. 1127, 14 Vin. 386,* are authorities to show that so general a statement as this is bad. [WILLES, J., referred *to *The King v. Kinnersley, B. R., T. 5 G. 1, 1 Str. 193.*] It must be a conspiracy to do something. [BULLER, J.—Here the act intended is stated.] It is only the consequence and not the means that is stated. [Lord MANSFIELD.—Be the means what they may, if it be in consequence of a conspiracy it is criminal.] 2. The issue is not well joined, for it does not appear that any of the defendants but Eccles have pleaded.

Lord MANSFIELD.—The conspiracy is to prevent Booth from working, the consequence is poverty. Both the conspiracy and the consequence are stated; but it is objected, that there is no allegation of the means. Such an allegation is unnecessary. The later cases, and especially *The King v. Kinnersley*, are very strong. As to the objection on the issue, the record goes on and says, “they and each of them.”

BULLER, Justice.—The indictment states more than is sufficient in alleging that the defendants conspired “by indirect means.” The means are matter of evidence. If the indictment had stated that they conspired to prevent Booth from carrying on his trade, it would have been sufficient: “by indirect means” is surplusage. As to the issue, it does not appear by this record that any of the defendants let judgment go by default. Therefore the Court cannot go into the matter, and the issue is joined, though in a very slovenly manner. If any of the defendants have in fact let judgment go by default, and are injured by this manner of entering the issue, they have their remedy against the clerk in the Crown Office.

Motion denied.

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*FOLKES v. CHAD and Others. Nov. 27.

Trespass brought by order of the Court of Chancery, to try whether a bank erected by the plaintiff was a nuisance to the harbor of Wells. The jury found for the defendants, and accompanied the verdict with the following observations, which
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were endorsed on the *postea*: "The jury also find that they all agree that the continuance of the bank is some injury to the harbor, but are not all agreed to its being a material injury. That it did not appear to the jury that any legal proceedings were had within the space of twenty years from the time of the erection of the bank." Held that this finding was no ground for setting aside the verdict, either as to showing that the nuisance was immaterial or that the possession of the bank by the plaintiff for twenty years was a bar.

THIS cause having been tried a third time (*vide ante*, p. 157) at the Summer Assizes for the county of Norfolk, before Mr. Justice ASHURST, a verdict was found for the defendants, and a special endorsement was made upon the *postea* to the following effect: "The jury also find that they all agree that the continuance of the bank is some injury to the harbor of Wells, but are not all agreed to its being a material injury: that it did not appear to the jury that any legal proceedings were had within the space of twenty years from the time of the erection of the bank." *Mansfield*, S. G., on behalf of the plaintiff, obtained a rule to show cause why the verdict for the defendants should not be set aside, and a verdict entered for the plaintiff, or a new trial had between the parties. He grounded the first part of his rule on the fact found by the jury, and endorsed, that no proceedings at law had been had within twenty years from the time of erecting the bank, which he had insisted, at the trial, entitled the plaintiff to a verdict; and he relied, on what he said had been the practice on the western and Oxford circuits—not to suffer a nuisance to a way to be impeached after twenty years' continuance. The second part of his rule he founded on the endorsement, by which it appeared that the jury did not find it a material injury, which he said was necessary to constitute a nuisance. ASHURST, J., who tried the cause, reported that, in his directions to the jury, he told them that there were two matters for their consideration: 1. Whether the harbor was materially injured by the bank in question. 2. Whether the removal of the bank would materially tend to restore the harbor. He told them that it might be worth while to consider the second question, and to state their opinions on it, though it was not necessary to their finding their verdict for the plaintiff or defendants. That as to the twenty years' continuance, he did not agree with the counsel for the plaintiff, that it entitled the plaintiff to a verdict; but he told the jury to find that fact, as it might be material in guiding the discretion of the Court of Chancery. The jury found a verdict for the defendants, accompanied by the special matter stated on the *postea*. The learned Judge *added, "I told the jury that they could not find for the defendants unless they thought it a material injury. Therefore [*341] they must have thought it material. I understood the meaning of the jury to be, that they were not agreed as to the precise extent of the injury, and how far the removal of it might or might not restore the harbor. I thought myself that the bank was an injury to the harbor." There was some dispute about the fact of the jury bringing in a verdict for the defendants, the plaintiff asserting that they only found the special circumstances as endorsed, but the Judge said that they expressly found a verdict for the defendants.

Hardinge, Cole, Graham, and Le Blanc showed cause.—The first part of the rule is grounded on a supposed principle of law, that twenty years' continuance of the nuisance is a legal bar. This point was never taken before the third trial, though the fact appeared from the commencement of the proceedings in Chancery. If such a possession be a bar, the fact should have been pleaded. *Pepy's case*, C. B., E. 25 Eliz., 3 Leon. 80; *Brooke* on the Statute of Limitations, 80. In none of the books is it considered a bar, but only as a ground of presumption. In the case of a private way, it affords a presumption of a license; but it is otherwise with regard to a public way, where a grant from the crown, founded upon a writ of *ad quod damnum*,

and another way set out, must be presumed. In *Keymer v. Summers*, Bull. N. P. 74, where a way had been used for thirty years, Yates, J., said that the user of the way for all that time was sufficient to afford a presumption of a grant or license from the party. But how can this presumption apply to the case of a harbor? Besides, here the injury has been progressive, and may not have been discovered for many years; while in the case of the way it is immediate. The finding of the jury upon this part of the case merely is, that no legal proceedings were had within twenty years from the erection of the bank. This is merely a finding of evidence, and can form no ground upon which the Court can proceed. It is for the jury to draw the conclusion from such evidence. *Mayor of Hull v. Horner*, B. R., T. 14 Geo. 3, Cowp. 102.

[*342] With regard to the second point, the finding of the jury *is merely in consequence of the order of the Court of Chancery, and for the convenience of that Court. Independently of the finding, there is a distinct verdict for the defendants. But it may be admitted, for the sake of argument, that the endorsement is in the nature of a special verdict, and that the injury is immaterial. To justify the verdict for the defendants, it is enough that it is an injury. Materiality is of little consequence in estimating the damages, but not in governing the verdict. Would the immateriality of a theft be a defence? Or, to a plea of a nuisance, would a replication that the nuisance is immaterial be good? A gate, not locked, across a highway, is immaterial, if anything can be so, and yet it is a nuisance. So a house encroaching on the widest highway. It is said, in *Mary's case*, B. R., T. 10 Jac. 1, 9 Rep. 113 a, that if the trespass on a common be so small that the commoner has not any loss, he shall not have an action, but the tenant of the land shall. So the master of a servant shall not, for every small battery, have an action, but the servant himself shall. Was there ever a demurrer to an indictment for a nuisance, because "*grave*" was not added to "*nocumentum*?" The mischief in this case was progressive. A man may commit an immaterial injury every day, while the sum of the injuries will be material. The true construction of the endorsement on the *postea* is, that the injury was material enough to make a nuisance, but the jury could not agree as to the extent of the materiality.

Mansfield, S. G., *Partridge*, *Joddrel*, and *Sayer*, contra, upon the first point contended that many presumptions were applicable in this case, as well as the presumption of license in the case of a private way; that even a record might be presumed from length of time; and that the reason why decisions on such points were not found in the books was, that the questions had arisen in modern times. Upon the second point, they argued that this was not a nuisance in itself, but only from its effects, and that therefore the cases of highways stopped up or encroached upon did not apply; that, upon this finding, it could not be said that the continuance of the bank would be a nuisance; and that, at all events, if there were any doubt on that point, there must be a new trial. It was never left to the jury, what, supposing the injury to be material, was the degree of the materiality.

[*343] *Lord MANSFIELD.—This cause has been tried three times. I should regret sending it to a fourth trial, and I am glad I am fully satisfied that it is not necessary. The action was brought to try the legal point. The degree of materiality was not in question. If it be an injury, it is enough; but an injury is something that a jury can grasp. The Judge at the last trial was justly favorable to the plaintiff. He told the jury not to go on mathematical injuries. He added, that they might consider whether the removal would be of any advantage. This they could not determine. But the endorsement, as far as an injury is found, is consistent with the report

of what passed. As to the other point, the length of time is clearly not a bar, nor anything like a bar. It is a public nuisance, which may increase every hour; and it is nobody's business to prosecute. I cannot rely much upon circuit cases, but certainly with regard to a private way there may be a presumption of a license; and even in the case of a public way, it may be presumed never to have been a way. Everything arising from the endorsement is for the Court of Chancery. The verdict must stand.

WILLES, Justice.—The endorsement must mean, "We are not agreed to what degree material." The point as to the twenty years is given up on the part of the plaintiff; for it is admitted to be no bar, and as evidence it was left to the jury.

BULLER, Justice.—The cause was tried favorably for the plaintiff. On the face of the endorsement, I see no great difficulty. It must mean the extent of the materiality. There remains the objection that the twenty years are conclusive: but length of time is neither a bar nor conclusive in any nuisance, public or private. It is evidence, but not conclusive, for conclusive evidence is a bar. There are other matters, besides license, of which length of time may be evidence, as of there never having been a right. Still it is only evidence. It is said that it is material that this is a nuisance only from its effects; but that argument turns the other way, and distinguishes this case from that of highways. Therefore length of time is not so strongly applicable, even as evidence, in this case, as in those which have been mentioned.¹

Rule discharged.

¹ See *Voight v. Winch*, B. R., T. 59 G. 3, 2 B. & A. 662; *R. v. Montague*, B. R., T. 6 G. 4, 4 B. & C. 598.

*TALBOYS v. BROWN. Nov. 28.

[*344]

In an action on the stat. 9 Anne, c. 25, § 2, it is sufficient to allege in the declaration that the defendant had a hare in his possession.

THIS was an action of debt on the statute 9 Anne, c. 25,¹ tried at Chelmsford, before GOULD, J. The declaration contained eight counts:—1. For buying seven hares on the 1st of January; 2. For having in his possession seven hares; 3. For exposing to sale seven hares; 4. For buying four hares on the 8th of January; 5. For having in his possession five hares; 6. For exposing to sale five hares; 7. and 8. For having in his possession five and seven hares; he being a carrier. The evidence was that the defendant was driver of the Norwich stage coach, and purchased and had in his possession seven hares on the 1st of January, and five more on the 8th of January. The jury found twelve penalties, and the verdict was taken on the second and fifth counts. *Peckham* having moved in arrest of judgment on the ground that having hares in possession is not itself an offence, but only evidence of an exposing to sale,

Erskine showed cause, and cited *Jones qui tam v. Bishop*, B. R.; M. 26 G. 2, Sayer, 64.

THE COURT, on the authority of that case, held that the allegation in the second and fifth counts were sufficient. The statute providing that having a hare in his possession shall be deemed an exposing to sale, it was enough to declare in the words of the statute.

Rule discharged.

¹ By sect. 2, if any hare, pheasant, partridge, moor, heath-game, or grouse shall be found in the shop, house, or possession of any person or persons whatsoever, not qualified in his own right to kill game, or being entitled thereto under some person so qualified, the same shall be adjudged, deemed, and taken to be an exposing thereof to sale within the true intent and meaning of the act.

C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Hilary Term,

IN THE TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

SALOUCCI *v.* WOODMASS.¹ Jan. 26.

Where goods were insured, warranted neutral, on board the *Thetis*, "a Tuscan ship," and the ship and goods were captured by the Spaniards, and condemned as a "good and lawful capture," it was held that this sentence was conclusive evidence that the goods were not neutral.

THIS was an action on a policy of insurance upon goods, warranted neutral, on board the *Thetis*, "a Tuscan ship." At the trial, before Lord MANSFIELD, at Guildhall, the defendant relied upon the following sentence of a Spanish Court of Admiralty as disproving the warranty of neutrality.

"Madrid, 24th March, 1781.—We declare the capture made by the privateer, Captain Antonio Ferrer, of the Tuscan frigate called the *Thetis*, Captain Joseph Monteverdi, with the merchandises and effects of which her cargo consists, to be good and lawful; and the whole shall be given to Giacome Regulus and his associates, fitters-out of the xebec, *Santa Teresa*, commanded by the said Ferrer, and to the aforesaid Monteverdi the certificates and corresponding passports, that he may withdraw himself with his [*346] ship's crew in the usual manner: and before the *publication of this sentence, let his majesty be consulted. Royal resolution, as proposed; and if any of the parties choose to appeal, let it be admitted."

Lord MANSFIELD being of opinion that this sentence was conclusive, the plaintiff was nonsuited; and in Hilary Term last a motion was made to set aside the nonsuit, which was repeatedly enlarged in order to give time to get proceedings and papers from Spain and Italy. The papers now arriving, the motion now came on as a peremptory.

Lee and *Piggott* in support of the rule. There is nothing on the face of this sentence to show that the ship was condemned on the ground of its being enemy's property, and the plaintiff, therefore, ought to have been permitted to go into evidence to show the warranty of neutral property was not falsified. *Bernardi v. Motteux*, B. R., H. 21 G. 3, ante, vol. ii. p. 575. There is nothing on the face of this sentence to show the ground upon which

¹ S. C., but without the arguments of counsel, Park, Ins. 471, 6th ed.

the Court in Spain proceeded. They only condemn the ship as a lawful capture. Certainly in *Bernardi v. Motteux* there were circumstances which induced the Court to think that the foreign Court did not proceed on the ground of the ship being enemy's property. Here the sentence itself calls the *Thetis* a Tuscan ship, and so far supports the policy. Nothing appears to show that she was not a neutral ship, and condemned on other grounds than being enemy's property.

Peckham, contra.—The presumption is always that the condemnation was on the ground of enemy's property, unless the contrary appears on the face of the sentence.

Lord MANSFIELD.—This is an action on a policy upon goods warranted to be neutral property, and the ship is stated to be a Tuscan ship. A sentence of condemnation, as lawful prize, affords a presumption that the goods were enemy's property, unless the contrary appears on the sentence. In *Bernardi v. Motteux* there were circumstances on the face of the proceedings that showed the condemnation went on a special ground. Here, on the contrary, the proceedings show no special grounds. In order to prevent the condemnation from being conclusive, it is incumbent on the plaintiff to make out a special ground. None appears. The sentence is an inaccurate one; but it seems to have gone upon the *question, whether the goods were free or prize, which can only be on the ground of property. The [*347] general rule, independent of treaty, is that enemies' goods may be taken on board a neutral ship, and friends' goods are free though in an enemy's ship. Rule discharged.¹

¹See *Barzillai v. Lewis*, B. R., T. 22 G. 8 ante, p. 126; *Mayne v. Walter*, B. R., T. 22 G. 8, ante, p. 79; & *Salucci v. Johnson*, B. R., H. 25 G. 8, post, vol. iv.

PUGH v. MARTIN.¹ Jan. 26.

Where the cause of action arises in the term, and the memorandum of the bill is of the term generally, the plaintiff may show, in evidence, the suing out of the writ, and elect to consider it the commencement of the action.

THIS was an action of assault tried at Westminster, before Lord MANSFIELD, after the last term, when a verdict was found for the plaintiff. The memorandum of the bill was of Trinity Term generally, and the cause of action arose within the term; but it appeared in evidence that the bill was sued out after the commencement of the term, and after the cause of action arose.

Peckham moved to set aside the verdict for the plaintiff, and to enter a verdict for the defendant, and cited *Venables v. Daffe*, B. R., 2 W. & M. Carth. 113. See *Dobson v. Bell*, B. R., M. 28 Car. 2, 2 Lev. 176. The action there was for a malicious prosecution in indicting the plaintiff for keeping a disorderly house. The declaration, which was of the term generally, stated that the plaintiff was acquitted at the sessions held on such a day. That day was within the term; and it was held that the acquittal, being the cause, or at least the consummation of the cause of action, and that not having happened till after the first day of the term, the action could not be maintained without a special memorandum.

ASHURST, Justice.—The repugnancy there appeared on the face of the record.

BULLER, J.—Even if it were not so, one case against the objection is

¹S. C. cited 1 Tidd, 144, 8th ed.

better than twenty for it, it being merely an objection of form. There was a case, see *Morris v. Pugh*, B. R., M. 2 G. 3, 2 Burr. 1241; in which Mr. [*348] *Lucas* *was counsel before Lord MANSFIELD, in which it was decided, that it is in the election of the plaintiff to consider the memorandum, or the actual suing out of the writ, as the commencement of the suit.

Lord MANSFIELD said, that he had so stated the rule at *Nisi Prius*, with the exception, that in penal actions, and in cases on the statute of limitations, the defendant may always resort to the real time. Motion denied.¹

¹ See *Foster v. Bonner*, B. R., E. 16 G. 3, Cowp. 454; 2 Saund. 1 (n), 5th ed.; 1 Tidd, 144, 8th ed.; *Ruston v. Owston*, Exch. Ch. H. 5 & 6 G. 4, M'Cl. & Y. 202; *Lester v. Jenkins*, B. R., T. 9 G. 3, 8 B. & C. 339, 2 M. & R. 429, S. C.

ONSLOW v. SMITH and Another. Jan. 27.

An action may be maintained under st. 1 G. 1, st. 2, c. 5, against hundredors, by the trustees in whom the property in a house of correction, belonging to the county, is vested, for the demolition of the house by rioters.

THIS was an action against the hundred, upon the statute 1 Geo. 1, st. 2, c. 5, to recover damages sustained by the demolition of certain premises pulled down by the rioters in 1780. The action was tried at the Surrey assizes, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated, in substance, that the premises destroyed were the house of correction, which belonged to the county, and which had been vested in trustees, of whom the plaintiff was the survivor. The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Rous, for the defendants, was directed by the Court to begin. The first objection to this action is, that the county cannot recover against the hundred, which is a part of themselves. If the case had been free from the technical embarrassment of trustees, it could not have stood a moment. But the intervention of a trustee can make no substantial difference. He is merely an instrument of conveyance, and has no interest. The remedy is given to the party-damified. But how is the trustee damified? Where the statute meant to give persons standing in the situation of trustees a remedy, it has done so, as in the case of rectors and vicars. In framing the [*349] statute the legislature had *two objects in view:—1. To relieve individuals by throwing the loss upon a large number of persons; and, 2. To make it the interest of the greater number to suppress the riot. If the larger body may recover, as in this case, against the smaller, it prevents the body at large from interfering to suppress the riot, and it throws the burden from the greater upon the smaller body. The second objection is, that the declaration states this to be a dwelling-house; but a house of correction is not a dwelling-house within the meaning of the act. A house may be a dwelling-house, for some purposes, and not for others. Thus a house of correction has been held not to be a dwelling-house, so as to be ratable to the window-tax. The question is one of considerable importance in this case, as there are five gaols within this district of the half hundred of East Brixton.

Lord MANSFIELD, stopping *Hunter*, who was to have argued for the plaintiff.—Two objections have been taken to the right of the plaintiff to recover in this action:—1. That this is not a dwelling-house within the statute; and, 2. That as this is a trust for the county, and as the county themselves could not maintain an action, the plaintiff, their trustee, cannot. I am of opinion

that there is nothing in either of the objections. This is a dwelling-house, and burglary may be committed in it. As to the trust, the court will take notice of trust, and have done so of late years in many instances. Supposing money belonging to the county is taken by robbers in a hundred—cannot the county recover against the hundred?

BULLER, Justice.—These houses have been held to be dwelling-houses, and persons have been indicted and convicted of setting fire to them under the statute 9 Geo. 1, c. 22. *The King v. Donnevan*, B. R., E. 10 G. 3, 2 W. Blackstone, 682. Judgment for the plaintiff.

*CARSAN, Administratrix, &c. v. WATTS. Jan. 27. [*350]

The prize-money gained by an apprentice, serving on board a letter of marque ship, does not belong to the master of the apprentice, the usage being proved to be that such money is the property of the apprentice. *ASHURST*, J. dis.

THIS was an action on the case, tried at Lancaster, before BULLER, J. The declaration stated that the defendant was owner of a letter of marque called the *Kitty*, and in consideration that the intestate would serve as a mariner on board the said ship, undertook and promised to pay him a certain proportion with the rest of the crew, in one-fourth of the produce of the prizes she should take. That the ship took a prize, and that the intestate's share amounted to £51. There was another count for the intestate's share in another prize; and also counts for work and labor, and on an account stated. The defendant pleaded the general issue: and at the trial a special case was made, which stated the pleadings, and that it was proved at the trial that the intestate served on board the *Kitty*, a letter of marque ship, as a sailor, under the agreement mentioned in the declaration; and that he went two several voyages in the said ship, which took two prizes; and that the share of each sailor on board thereof amounted to £51. 9s. The intestate was during all that time an apprentice to William Crozier as a mariner, who received the wages which became due to him for the two voyages, and who now claims the share of the prize-money in question.

The case was argued in Michaelmas Term by *Wood* for the plaintiff, and by *John Heywood* and *Wilson* for the defendant; and again in this term by *Lee* for the plaintiff, and by *Wilson* for the defendant.

Lee, for the plaintiff.—The question is, whether a person, being an apprentice, who goes to sea with his master's consent, is entitled to a share of prize-money for prizes taken, or whether the master is entitled. There appears to be only one reported case on the subject, *Hill v. Allen*, 1 Ves. sen., 83, where Lord HARDWICKE seems to have considered it an unsettled point. [BULLER, J.—Lord HARDWICKE states it as clear law that the master is entitled.] The event of the case was in favor of the apprentice; which seems to show that the point was not settled, and is still open to argument. It is an extraordinary assertion to say, that an apprentice to a *civil business, going to sea out of his master's tuition, shall earn for his master, not wages only, but prize-money, the compensation of danger and wounds. Inquiries have been made amongst the prize-agents, who say, that it was the uniform practice, as it was that of the late war, the apprentice should have the prize-money, and the master the wages. That usage is conclusive against the master. [Mr. T. Ward, the agent of both parties, confirmed this account of the inquiries, made by him, at the request of the court.] [Lord MANSFIELD.—The result of the inquiries seems extra-

¹ The agents applied to were Ommaney, Creed and Marsh, Komble, Sykes, and others, all agents for men-of-war, and not for privateers.—Note by Mr. Wilson.

ordinary, because on board privateers there are no wages; and it appears to have been determined in a case in *Salkeld*,¹ that on board a man-of-war the master is entitled to all the apprentice's earnings.] [BULLER, J.—There were wages here, and the case states that the master received them.]

Wilson, contra.—The usage at Liverpool, where this contract was made, and at Bristol, is quite uncertain, and depends upon the will of the master. The master is entitled to the service of his apprentice: the prize-money is the consideration for the service, and belongs to the master as much as the apprentice's wages. Whether the apprentice went to sea with the consent or not of the master is immaterial, if the latter afterwards ratifies the act. [Lord MANSFIELD.—Did the apprentice go to sea with the master's consent, or not?] [BULLER, J.—There was no evidence given on the point. I rather thought the boy went on board without the master's consent. If the boy went with the master's consent, the reason of the thing seems to be that the master shall have the wages; if he went without such consent, the master may recover a satisfaction for the loss of the service—the damages he has sustained by it in his trade—what he himself has lost, not what the apprentice may have gained. There can be no reason why he should take the large fortune his apprentice may have gained by the risk he has run.] That principle would go too far; for it would show that the master would not be entitled to wages, but only to a satisfaction for loss of service, in another way, and as something different from wages.

[*352] **Lee*, in reply.—The principle of law does not go so far as is contended for on the other side. If the master has the benefit of his apprentice's service in the fair way of his duty as an apprentice, he is entitled to nothing further. Here he has had that benefit, but he requires something more. Would he be entitled to the earnings acquired by the apprentice at by-hours, after doing all his master's business?

ASHURST, Justice.—Suppose that, instead of prize-money, the captain of the ship had agreed to give higher wages—would not the master of the apprentice be entitled to such wages? The doubt seems to me to have arisen from the practice in king's ships, where prize-money is not earnings, but the bounty of the crown, and therefore does not go to the master. In privateers and letters of marque, prize-money is not bounty, but stipulation, and I do not see how it can be distinguished from wages.

WILLES, Justice.—I think the master is entitled to all the wages or money fairly acquired by the apprentice as for labor or service; but to any extraordinary gains he may acquire, out of the usual course of his service, I think the master not entitled. Suppose that, in case of a wreck at sea, an apprentice, by any exertion of his own, had recovered part of the wreck from a ship stranded, would the master be entitled?

Lord MANSFIELD.—It is very extraordinary that no case should have occurred since 1747. I did think it had been decided. Upon the first argument, I thought it clear that whatever an apprentice who runs away gains in another service *eo nomine* belongs to the master, and is earned for him; and that, if it is anything specific, the master may bring trover for it.² I could see no distinction, in the case of a privateer or letter of marque, between wages and prize-money which is in lieu of wages. In men-of-war there is a difference. This is not like the case of extraordinary gain, as the instance put of treasure trove, recovery of wreck, &c., for that is no remuneration of service. But I am now struck very much with the usage, and am

¹ *Quære Barber v. Dennis*, B. R., T. 2 Ann. 1 Salk. 68? But that was not the case of a man-of-war.

² Accord. dict. per Lord ELLENBOROUGH, *Foster v. Stewart*, B. R., M. 55 Geo. 3, 3 M. & S. 198.

unwilling to go against it. We must take that usage to be as stated by Mr. Ward, and I think it ought to decide.

*BULLER, Justice.—Independently of statutory regulations, the prize-money is as much a bounty of the crown on board privateers as [*353] on board king's ships. There does not seem to be much difference in the case from that circumstance. The master's remedy is against the parties to the covenant in the indenture of apprenticeship. I rather incline to the opinion which I held last term, that such is the remedy, and that the apprentice is entitled to the prize-money acquired.

Judgment for the plaintiff.¹

¹ See *Eades v. Vandeput*, B. R., M. 25 G. 3, post, *Foster v. Stewart*, B. R., M. 55 G. 3, 3 M. & S. 191; *Lightly v. Clouston*, C. B., H. 48 Geo. 3, 1 Taunt. 112.

COX v. LISTARD.

(Reported, ante, vol. i. p. 166, note [† 55].)

STEPHENSON v. PRICE and Another. Jan. 27.

In an action on a charter-party, by which the defendants covenanted to unload and receive the cargo at Charlestown, and then and there put on board 100 tons of goods, &c., the plaintiffs assigned as a breach that no goods were put on board. The defendants after oyer of the charter-party, in which there was a proviso, that the freight of the homeward cargo should be paid on delivery at London, pleaded that the vessel never arrived in London on the homeward voyage, but was lost. On demurrer the plea was held bad.

THIS was an action of covenant on a charter-party, by which the brig Hope was chartered from London to Charlestown and back again. It was agreed in the charter-party that the vessel should lie at Charlestown for discharging and loading forty-two days. The covenant on which the breach was assigned was, that the defendants (who were also to load her outwards) "should unload and receive the same (cargo) out of her at Charlestown, and then and there put on board her 100 tons of goods, certain, or as they should think proper; and that within the several days or times above limited for doing thereof, or days of demurrage thereafter mentioned." The breach was that no goods were put on board within the time. The defendants pleaded, 1. *Non est factum*; 2. That the vessel did not lie at Charlestown, &c. On these two pleas issues were joined, and found for the plaintiff. They pleaded farther (after oyer of the charter-party, in which was a proviso that the "last-mentioned *freight (from Charlestown) shall be paid, one-half [*354] thereof on the true delivery of the said homeward cargo at London, and the remaining half by a good bill or bills payable in three months from thence next following). That the said vessel never did arrive at London on the homeward voyage from Charlestown, but was lost at sea, whereby the plaintiff lost the freight of the said homeward voyage. To this plea there was a demurrer.

Russell, in support of the demurrer. This action is not brought for the freight, but for not loading the ship. The cause of action accrued when the time for loading expired, and cannot be divested by a subsequent contingent event.

Bond, contra.—The claim of the plaintiff is for freight on the homeward bound cargo, which was only payable on the ship's arrival here.

Lord MANSFIELD.—That is no answer. The action is for not loading. You have broken your covenant, and there must be

Judgment for the plaintiff.

VALLE v. GARDINER.¹ Jan. 28.

Action on a charter-party for not loading a ship. The defendant (being under terms to plead issuably) pleaded that a survey of the ship was had, by order of the Admiralty Court of St. Kitts, and she was declared insufficient; wherefore, &c. Held that this was not an issuable plea, and that the plaintiff might sign judgment.

ACTION on a charter-party for not loading a ship. The defendant pleaded several pleas, one of which was that a survey of the ship was had by order of the Admiralty Court of St. Kitts, and she was declared insufficient, and therefore he did not load her. This plea was pleaded after time given by a Judge's order on terms of pleading issuably. The plaintiff, thinking the plea not issuable, signed judgment, which *Glanville* moved to set aside, on the ground that the plea was issuable, and that if it were not, the plaintiff was not at liberty to enter up judgment, but should have demurred.

Cowper and *Russell* showed cause.

BULLER, J., said the plea was clearly not an issuable plea within the meaning of the order. It was only evidence, and if the plaintiff had taken issue, it could only have been on the fact of the condemnation, and he would have [355] had no opportunity of entering into the merits of it. The plea ought certainly to have been that the ship was insufficient. The plaintiff might have demurred to the plea, if he had chosen it, but he was also at liberty to exercise his own judgment concerning it, and to sign judgment, but he did it at his peril. If he might not do so the effect of these orders would be lost. They were made to prevent delay, and usually, at the end of a term, and if a demurrer were necessary, the delay would be obtained.

The plaintiff's attorney, however, being willing to waive his judgment, and the writ of inquiry which had been executed, the rule was made absolute on payment of costs, giving judgment of the term, and undertaking not to bring a writ of error.

Rule absolute.

¹ S. C. cited Tidd, 477, 8th ed.

The KING v. UTLEY. Jan. 28.

(Reported, CALDERCOTT, 389.)

SPARKE v. STOKES, one, &c.¹ Jan. 31.

An attorney when sued has not the privilege of changing the venue to Middlesex.

LE BLANC moved to change the venue in this action to Middlesex, on the ground that the defendant, being an attorney, had the privilege of being sued, as well as of suing, in that county, for which he cited *Wigley v. Morgan*, B. R., T. 9 G. 2, 2 Str. 1049, but the Court said that it was constantly refused, and denied the motion, accord *Pope v. Redfearne*, B. R., H. 7 G. 3, 4 Burr. 2027; *Yeardley v. Roe*, B. R., H. 30 G. 3, 3 T. R. 573.

¹ S. C. cited Tidd's Pr. 76, 8th ed.

*HALL and Another, Assignees of PHYNN, a Bankrupt, v. GURNEY.¹ *Jan. 31.* [*356]

The owner of the major part of a vessel then lying in port mortgaged it, and transferred the grand bill of sale to the mortgagees. The mortgagees did not take possession, but suffered the mortgagor and the other part owners to have the management, and act as the visible owners of the vessel. The mortgagor having become bankrupt, held that his share in the vessel passed to his assignees, under the statute 21 Jac. 1, 19.

THIS was an action for money had and received by the defendant to the use of the plaintiffs, as assignees, tried after last term, before Lord MANSFIELD, at Guildhall, when a verdict was found for the plaintiff with £534 7s. 6d. damages, subject to the opinion of the Court on the following case.

The bankrupt, Walter Phynn, was owner of nineteen thirty-second parts of the vessel called the Friendship, and by indenture, dated the 4th July, 1777, and made between the said W. Phynn, owner of the major part of the brigantine, the Friendship of Yarmouth, whereof John Ranet was then master, of the one part, and John and Bartlet Gurney, bankers, of the other part, after reciting that the said J. and B. Gurney had, on the date thereof, paid and lent unto the said W. Phynn £400, which they were contented to stand to, and bear the hazard and adventure of on the hull of the said vessel, upon such voyage and voyages as the said W. Phynn, his executors, administrators, and assigns, should think fit to make with her, and upon the terms after mentioned: it is witnessed that in consideration of £400 unto the said W. Phynn, lent and paid by the said J. and B. Gurney, the said W. Phynn did grant, bargain, and sell, unto the said J. and B. Gurney, their, &c., all that the aforesaid brigantine, called the Friendship of Yarmouth, of the burden of 140 tons or thereabouts, and all the anchors, &c., to hold, &c., as their own goods and chattels. Proviso that if the said W. Phynn, his, &c., should pay unto the said J. and B. Gurney, their, &c., £400 within six calendar months next after they should give notice in writing for that purpose to the said W. Phynn, his, &c.; but such notice not to be given till six months after the date thereof (unless an utter and total loss of the said brigantine by the seas, &c., should, in the mean time, happen); and also if the said W. Phynn, his, &c., should pay unto the said J. and *B. Gurney half [*357] yearly, from the date hereof, for so long time as there should not be an utter or total loss of the said brigantine by the seas, &c., and the principal sum should remain unpaid, the sum of £26, as and for the interest and premium for the hazard of the same principal money, then the grant and assignment thereby made should be void. Declaration by all the parties that the principal sum of £400 should not be due or paid until six calendar months' notice should have been given by one of the parties unto the other for payment thereof; and also that in case default should be made in payment of the said £400 and interest, or any part thereof, or in the performance of the proviso before contained, it should be lawful for the said J. and B. Gurney, or either of them, upon the said brigantine to enter, and the same, with all her materials, to dispose of by public or private sale, without any interruption, &c.; and also that in case there should happen an utter and total loss of the said brigantine before the said principal money should be payable by the said indenture, then the payment thereof should not be demanded or recoverable by the said J. and B. Gurney, but the loss thereof should be borne by them; nevertheless the premium should be paid to the date of the said loss. At the time of

¹ S. C., Co. B. L. 231, 1st ed. 858, 8th ed., shortly reported without the arguments of counsel.

making the said indenture the brigantine was at Yarmouth, and the grand bill of sale was delivered to the defendant. W. Phynn and the other part owners of the brigantine had the management, and appeared and acted as the visible owners of her, from the time of the assignment to the defendant to the bankruptcy of W. Phynn, which happened on the 18th of June, 1782. The defendant and the solvent owners sold the brigantine at Bristol, on the 29th of January, 1783, and recovered the purchase money.

The question for the opinion of the Court is, whether the defendant is entitled to retain so much of W. Phynn's share of the money arising from the sale, as will be sufficient to discharge the principal and interest due on the assignment.

The case was argued in Michaelmas Term, by *Touchet* for the plaintiffs, and *Wood* for the defendant.

Touchet for the plaintiffs.—The question depends entirely on the construction of the statute 21 Jac. 1, c. 19. For a long period after the passing of that act, no question arose upon it. "I do not remember," says Lord HARD-
[*358] WICKE, "in this Court, or while I sat in another, that the construction of these clauses was ever made a point in any case, *Bourne v. Dodson*, 1 Atk. 156. The statute was much considered in the case of *Ryall v. Rolle*, 1 Atk. 165; 1 Ves. sen. 348, which has governed this head of law ever since, and is exactly this case. The same doctrine was maintained in *Worsley v. Demattoes*, B. R., H. 81 G. 2, 1 Burr. 467. Here the bankrupt continued in possession of the ship for five years after the mortgage, and the case comes precisely within the words of Lord MANSFIELD in the latter case. "If he mortgages, and parts with the possession of goods, the world has notice; but to give priority from mortgaging goods, of which the trader is allowed to appear and act as the owner, would be enabling him to impose on mankind, and draw them in by false appearances." So in *Ex parte Matthews*, 2 Ves. sen. 272, it was held that if the mortgagee takes all the means in his power to get possession, his title will be good against the assignees; but if he were to suffer the ship to come back, and to go on another voyage, the case would be very different; for that the delivering of the grand bill of sale would not be sufficient, if there was an opportunity of taking possession. In the present case the vessel was in harbor at the time of the mortgage, and possession might therefore have been demanded and obtained.

It may perhaps be said that this resembles the case of bottomry; but that power of hypothecation exists only in the master in foreign parts from necessity, and not in the owners; nor could that right prevail against the express provisions of an act of parliament.

The case of *Stephens v. Sole*, cited 1 Atk. 157; 1 Ves. sen. 352, is in point for the plaintiffs. [Lord MANSFIELD.—I wish to see that case from the Register's book]. The decree in that case has been examined. [Lord MANSFIELD.—Was the grand bill of sale delivered in that case?] It appears that the bill of sale was delivered. [Lord MANSFIELD.—That means the bill of sale made by the bankrupt.] The principle is, that when a mortgagee does not take possession, he waives his lien, and is content with the general security. The statute of James supposes a good consideration between the bankrupt and the mortgagee; but makes possession sufficient to
[*359] entitle the assignees. It does not intrust the jury with the question of fraud. In a case of *Crowther and others, Assignees, &c. v. Assignees of Case, Semble, Falkner v. Case*, Canc. 1781, 1 Br. C. C. 125, more full, 2 T. R. 491, it was held that where a ship at sea was mortgaged, and the policies and bills of lading delivered, it was good, because everything was done that could be done. There Lord THURLOW said it was good, as long as the vessel continued at sea.

Wood, contra.—On the construction of the act of parliament, the defendant is entitled to retain the money arising from the sale. Both the clause itself, and the preamble to it, show that it was not intended to extend to the case of a mortgage; and of that opinion Lord HARDWICKE appears to have been in the case of *Bourne v. Dodson*, where he says, that *Stephens v. Sole* was decided on particular circumstances. *Ex parte Matthews* is an authority in favor of the defendant, for here the grand bill of sale was delivered, which is the only muniment. The doctrine contended for on the other side would put an end to the mortgage of ships by way of bottomry; for the possession of the ship always remains in the mortgagor, and is the only thing which enables him to pay the interest. Here there never was a time when the mortgagor could take possession according to the tenor of the deed, for possession was only to be delivered on default of payment on notice. The mortgagor had not the order and disposition of the vessel within the intent of the statute, for not having the grand bill of sale, he could not dispose of the ship. *Walker v. Burnell*, ante, vol. i. p. 317.

Touchet, in reply.—The preamble of the clause shows that this case was intended to be included, "for that it often falls out that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, and yet still do keep the same," &c. It was therefore the mischief of the bankrupt continuing in possession that was intended to be guarded against. This mortgagor certainly acted as owner, for he made charter-parties, &c. *Bourne v. Dodson* is not inconsistent with the present case, for the mortgage is good while the vessel remains at sea. Besides, that case never received a decision. There can now be no doubt that mortgagees are within the statute, for *Stephen v. Sole* is recognised in *Ryall v. Rolle*. As to inconvenience, *that argument was considered in *Ryall v. Rolle*. There may be some on both sides, but it is for the legislature, and not for this Court, to provide a remedy. [*360]

Cour. ad. vult.

Lord MANSFIELD now delivered the judgment of the Court. The single question in this case was, whether the transaction was within the statute 21 Jac. 1, c. 19. It has been determined in several cases, that the mortgage of a ship at sea, with a delivery of the grand bill of sale, is not within the statute; and on the argument I was much inclined to regard this in the same light as a mortgage of landed property. But the case of *Stephens v. Sole* was mentioned, and on inquiry it appeared that there the grand bill of sale was delivered to the mortgagee, the bankrupt keeping possession. We look on that case as an authority, and there must therefore be

Judgment for the plaintiffs.¹

¹ This case was cited in *Atkinson v. Maling*, B. R., E. 28 G. 3, 2 T. R. 462, where the mortgage was held good, the grand bill of sale being transferred, and the mortgagee taking possession as soon as the ship returned to port. See also *Ex parte Batson*, Canc. 1791, 1 Co. B. L. 356, 8th ed. But where on the return of the vessel to port the mortgagee neglected to take possession, it was held that the ship passed to the assignees of the mortgagor. *Mair v. Glennie*, B. R., T. 55 G. 3, 4 M. & S. 240. The register acts will not prevent a ship, the conveyance of which has been executed in pursuance of those statutes, from passing to the assignees of the mortgagor, if left in his possession, &c. *Robinson v. Macdonnell*, B. R., T. 56 G. 3, 5 M. & S. 228; *Hay v. Fairbairn*, B. R., M. 59 G. 3, 2 B. & A. 193, 2 B. & B. 114, S. C. on error. See also *Kirkley v. Hodgson*, B. R., E. 4 G. 4, 1 B. & C. 588; *Robinson v. Macdonnell*, B. R., M. 59 G. 3, 2 B. & A. 134. As to the transfer of part of a ship only, see *Addis v. Baker*, Seacc. T. 33 G. 3, 1 Anstr. 222; *Gillespie v. Coutts*, Amb. 652. *Abbott on Shipp*. 18, 5th ed.

[*361] *HASSELLS and Another, Assignees of Jackson, a Bankrupt,
v. SIMPSON. Feb. 3.

(Reported, ante, vol. i. p. 89, note [† 89].)

GOODLITTLE dem. BAILEY v. PUGH. Feb. 3.

(Reported, Fearn, Cont. Rem. 578, 7th ed.)

PISTOL, on the demise of W. R. F. RICCARDSON RANDAL, Esq. v.
SARAH RICCARDSON, Widow.¹ Feb. 6.

Testator being seised of freehold lands, and possessed of leasehold lands for the remainder of a term of 1000 years devised "all his manors, advowson, donation rights of patronage and presentation, and all and every his several lands, tenements, and hereditaments whatsoever and wheresoever, whereof he was seised of, interested in, or entitled to, &c." Held that under this devise the leaseholds did not pass.

THIS was an action of ejectment for two farms in Cumberland, tried at Carlisle, before BULLER, Justice. The case reserved stated, That the testator, Christopher Randal Riccardson, was seised in fee of a freehold estate in Cumberland, worth £136 per annum; another in Northumberland, of £14; and another in Westmoreland, of £2. 10s., but was not seised in fee of any estate in the county of York. Of these estates, the lessor of the plaintiff, who is the only son of the testator, is in possession under the will. The testator was also seised of a copyhold of inheritance in the manor of Great Salkeld, worth £62 per annum, which he had not surrendered to the uses of his will; and of another copyhold of inheritance in the manor of Onsby, worth £66 per annum, which estates are not demisable. Of these copyholds the lessor of the plaintiff is in possession as heir-at-law of the testator. The testator was also tenant for life of freehold and copyhold estates in Cumberland, Northumberland, and York, worth £292, which, on his marriage, were settled on the defendant for her jointure, and in which the lessor of the plaintiff has a remainder in tail male. By the same settlement, £2000 was vested in trustees for younger *children, which, on [*362] the death of the defendant, will go to Sarah Ann Riccardson, the testator's only daughter. The defendant is also entitled, under the will, to a freehold estate in Cumberland of £25 per annum during her widowhood.

The testator was also possessed of the two farms in question, which are leasehold, and held for the remainder of two long terms of 1000 years, of which more than 800 years are unexpired, except a small part of one of these farms, which is freehold, and belongs to the lessor of the plaintiff, and is not in dispute. On the 5th November, 1778, the testator made his will as follows: "I do give, bequeath, and devise, all my manors, advowsons, donation, right of patronage and presentation, and all and every of my several messuages, lands, tenements, and hereditaments, whatsoever, wheresoever, whereof I am seised of, interested in, or entitled unto, lying and being within the several counties of Northumberland, Cumberland, Westmoreland, and in the East Riding of the county of York, to my only son, for and during the term of his natural life, with impeachment for all wilful waste; and, from and after his decease, the same to descend and go to the heirs of his body, lawfully begotten, they and each of them, bearing our arms, and always

¹ Short note of S. C. 1 H. B. C. 26 (n), 2 Cox's P. Wms. 459 (n).

using the name of Randal with their surname; and, in default of such issue by my only son," then a limitation, in like manner, to his daughter. He then gives a house, and some land round it, to his wife, the defendant, during her widowhood; "and I do hereby nominate, constitute, and appoint, my said dear wife guardian and sole tutor of my children, till they arrive at their respective ages of twenty-one; and I also appoint her sole executrix to this my last will and testament, upon this trust and confidence, that she will take proper care of my personal estate, as well as real, till my son arrives at the age of twenty-one. And it is my desire that my said wife shall give to my daughter two full thirds, at least, of my personal estate, one-third being enough, and too much, for my son, who will take lands sufficient for life."

The testator died in March, 1780, leaving the defendant, his widow, and the lessor of the plaintiff and Sarah Ann Riccardson, his only children, and leaving a personal estate of the value of £1650.

*The question for the opinion of the Court was, whether, under the will of Christopher Randal Riccardson, the leasehold as well as [363] the freehold estates passed.

The case was argued in Michaelmas Term by *Wilson* for the plaintiff, and by *Lambe* for the defendant.

Wilson, for the plaintiff.—The words of the devise are very extensive, and will pass leaseholds as well as freeholds—all that he was "seized of, interested in, or entitled unto." Surely the testator had an interest in land in which he had a term for 1000 years. It is true that it has been held, in some old cases, that by the words "all my lands and tenements," where these are both freehold and leasehold, the freehold only will pass. The case of *Mortimer v. Mortimer*, Canc. E. 5 G. 2, is in point. There the testator devised "all lands and tenements whatsoever whereof he was seised and possessed," and the Chancellor held that leaseholds as well as freeholds passed. If it should be said that the testator, by using the words "the same to descend to the heirs of his body," &c., has shown that he intended the freeholds only to pass, it may be replied that those words only prove that he was ignorant of the laws of descent.

Lambe, contra.—The objects of the testator's bounty were three: his wife, his son, and his daughter. The son was provided for, but the daughter, during the life of her mother, was wholly unprovided for. The leasehold, therefore, was meant as a provision for her. General words, in a will, may be restrained by the context: "all he is interested in" may relate to lands in which he has an equitable interest. In *Mortimer v. Mortimer*, the testator used the word *possessed*, which is peculiarly applicable to leasehold interests. The distinction is well established, that where the testator has both freehold and leasehold lands so situated, that both may be meant by the will, and uses general words, the freeholds alone will pass. *Rose v. Bartlet*, B. R., T. 7 Car. 1 Cro. Car. 292; *Day v. Trigg*, Canc. M. 1715, 1 P. Wms. 286; *Davis v. Gibbs*; ¹ *Knotsford v. Gardiner*, 2 Atk. 450. [Lord MANSFIELD.—In all those *cases the leases were common leases.] In [364] *Rose v. Bartlet*, the lease was for 100 years.

Wilson, in reply, contended that, in the old cases, the leases were of inconsiderable terms, as was then usual, and that the reasoning could not apply to a lease for 1000 years, which was, in fact, the whole interest; that the case of *Davis v. Gibbs* turned on the use of the words "real estate," which did not comprehend leaseholds; and that in *Day v. Trigg*, the leasehold was held to pass, although the devise was of freehold houses.

¹ Canc. Hil. Vac. 1729, 8 P. Wms. 26. This case was originally decided at the Rolls, Fitzg. 116. It then came on before the Lord Chancellor on appeal, and was ultimately carried to the House of Lords.

On the following day, Lord MANSFIELD stated, that the Court had looked into the cases, but were unable to get over that of *Davis v. Gibbs*; that they had strong inclinations the other way, especially as this was a term for 1000 years, but that they considered themselves bound by that case, which had been taken up to the House of Lords. They were therefore of opinion that there must be judgment for the defendant.

On a subsequent day, his lordship added, that the Court had again examined the cases; that there was a peculiarity in the case of *Davis v. Gibbs*; that the case in *Atkins* was very shortly reported; and that the Court was desirous that the case should be again argued, and a better note furnished of the case of *Knotsford v. Gardiner*.

Accordingly, in this term, the case was argued by *Lee* for the lessor of the plaintiff, and by *Arden*, S. G., for the defendant.

Lee, for the plaintiff.—The question is, whether, under the words in the will, the leasehold farms pass? The only decision directly in point is the case of *Rose v. Bartlet*, which is cited in many books, and was referred to *arguendo* by Lord MANSFIELD in *Knotsford v. Gardiner*. The principle is, that fee-simple lands only, and not leaseholds, pass by a devise of "lands and tenements." In a will no technical words are necessary; thus a fee will pass without the word *heirs*. The rule laid down in *Rose v. Bartlet*, supposing it to be well established, must yield where it contradicts the intention of the testator, as collected from the whole will. But that rule has not been recognised. In *Davis v. Gibbs*, the Court proceeded on the ground that there was another clause in the will by which the testatrix disposed of her [365] personal estate, mortgages, and credits. In *the present case the leaseholds come clearly within the words of the will. The testator uses the words *give* and *bequeath*, which are properly applicable to personal property, as well as the words *devise*, which is applicable to real property. He also uses the word *interested*, as well as *seised*. Where the words of the will are ambiguous, the presumption is in favor of the personal representative; but where, as in this case, the intention of the testator can be collected, that presumption will not operate.

Arden, S. G., contra.—Whatever might have been the construction of this will, had the question been *res integra*, the Court will hold themselves bound by the authorities. It is not in every case that the intention of the testator will be held to govern. A devise of "all my land" confers only a life estate, though the Court may feel assured, that the testator intended to give the fee. If a man has two houses, one in fee, and the other for a term of one thousand years, and devises "both his houses," the devisee will take an estate for life in the one, and the whole term in the other; yet it cannot be doubted that this is a flagrant violation of the testator's intention. But it is better that a general rule should be established, though, in particular instances, the intention of the parties should be defeated. With regard to the authorities, *Rose v. Bartlet*, and *Knotsford v. Gardiner*, are clearly in point; and if *Davis v. Gibbs* is not an authority for the defendant, it is not against her. *Matthews v. Matthews* is certainly in favor of the plaintiff; but the case was cited from Mr. Joddrell's notes, who was then a very young man, and it was not mentioned in *Knotsford v. Gardiner*.

At the conclusion of the argument, Lord MANSFIELD expressed a desire to be furnished with some further information respecting the cases of *Mortimer v. Mortimer* and *Knotsford v. Gardiner*; and, a few days afterwards, Mr. Justice BULLER read Mr. Justice CLIVE's note of the former case, from which it appeared that this was not the principal question, but that the words of Lord KING had been very accurately given in Mr. Joddrell's note. The case was, that the testator had only one freehold house, but that he men-

tioned other lands in the devise. That case, therefore, was perfectly clear of the present, the intent there being manifest. The Court directed the case to stand over, *in order that they might look into a case which had not been cited at the bar, *Turner v. Husler*, Cane. 1780, 1 Br. C. C. [*366] 78.

Lord MANSFIELD now delivered the judgment of the Court. After stating the case, his Lordship proceeded as follows: "I have stated the whole of the case, to show that no argument can be drawn except from the devise itself. The words are sufficiently comprehensive to take in everything; but the subject-matter of the devise is land. If we were left to conjecture, I should imagine that the testator did not know the distinction between freehold and leasehold, and that, if he had, he would have directed the latter to go with the former. But the question is, whether we are not precluded by authority from going into arguments at large on the intention of the testator?"

The general rule undoubtedly is, that the testator's intent, if manifest from the will, however expressed, shall prevail; and hence it has been often said to be a sort of paradox to cite cases on wills. Notwithstanding, there has been for ages a system of legal construction established on the subject of devises, by which, where a certain form of words is used, a construction is put upon that form, and adhered to for the sake of certainty. Where it is said that the intent shall govern, it must be understood that the intent is not to be collected from conjecture, but from the whole will taken together; and if the whole taken together manifests a certain intent, the Court cannot doubt—that intent must govern. But when, by the authorities, a certain construction has been established, the Court is equally bound, in cases exactly similar, to adhere to that construction. In illustration of this doctrine, the case of after-purchased lands may be mentioned. It was a probable argument, at first, to contend that such lands passed by a will executed before their acquisition, for the will speaks at the time of the testator's death. By the Roman law, also after-purchased lands passed: other reasons might have been urged; but, on the other side, it was said that a will, in this respect, resembled a conveyance; and that argument prevailed.¹ *It might as well have been decided the other way, but the doctrine cannot now be shaken. So the question of the want of words of [*367] inheritance in a will was probably settled from analogy to a conveyance. Much might have been said there, but it is now determined. It was a narrow construction, and defeats the intent of the testator, but it would work great mischief to overturn it. Again, a limitation to a man for life, and afterwards to the heirs of his body, gives an estate tail executed in him; yet who can doubt that the testator merely intended to give him a life estate?

Here the testator has freehold, leasehold, and personal estate, and gives his lands one way, and his personal estate another. There is a great distinction between real and personal estate. They have a different course of devolution. At first there might be an argument whether land does not mean real estate, in opposition to personalty. If that has been decided and adopted in Westminster Hall, it is convenient that the doctrine should be adhered to.

The single question then is, does such an authority exist? That authority is found in the case of *Rose v. Bartlet*. There all the Justices, with the exception of RICHARDSON, who was absent, resolved, "That if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements,

¹ This argument is made use of by Lord MANSFIELD in *Windham v. Chetwynd*, B. R., M. 81 G. 2, 1 Burr. 429. See also Mr. Justice BLACKSTONE's argument in *Perrin v. Blake*, Hargr. Law Tracts, 502; Gilb. Devises, 122, 1st ed.; Preston's *Shep. Touch* 488 (n).

the fee-simple lands pass only, and not the lease for years; but that if a man hath a lease for years, and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void." Then how has this authority been received in Westminster Hall? In *Day v. Trigg*, and in *Davis v. Gibbs*, the whole argument goes upon it. The next case is that of *Mortimer v. Mortimer*. It was at first cited from Mr. Joddrell's note, which, as a statement of the case, is not accurate; but Mr. Justice BULLER has found a note of the same case, by Mr. Justice CLIVE, and it appears from the will itself, that it was not within the rule. In 1742, the case of *Knotsford v. Gardiner* occurred, and there both sides admitted the rule. The doubt was, whether there was any freehold, and an issue was directed, which would have been unnecessary if *Rose v. Bartlet* had been overruled. Another case was thought of, but it does not apply; nor, upon inquiry, does that before Mr. Baron EYRE, sitting for *the Lord Chancellor.¹ These are all the authorities; they all admit *Rose v. Bartlet*, and we think ourselves bound by that decision.

Postea to the defendant.²

¹ *Turner v. Husler*, 1 Br. C. C. 78. See the observations of EYRE, B. in that case upon *Rose v. Bartlett*, and *Addis v. Clement*.

² It is singular that in the argument of this case no notice should have been taken of the case of *Addis v. Clement*, Canc. E. 1728, 2 P. Wms. 456, in which the words of the devise were, "all his messuages, lands, and tenements in the parish of D., which he then stood seised or possessed of, or in any ways interested in;" and the Chancellor held that they passed not only the testator's freehold lands, but also a renewable lease for 21 years, held of the church of Hereford. The decision appears, however, to have turned in some measure upon the peculiar nature of the leasehold interest: "As this lease," said the Lord Chancellor, "was held of the church, and always renewable, the testator might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance, and therefore the leasehold premises ought, I think, to pass by the will." He also distinguished the case from *Rose v. Bartlet*, where the words *possessed of* and *interested in*, were not to be found. A few years after the decision of the principal case, a question arose as to the effect of similar words in a release, when it was held by the Court of Common Pleas, that under the words "all lands or meadows to the said mill, &c., belonging or used, &c., as part thereof," leasehold as well as freehold lands passed, on the ground that, in a deed, the words shall be construed most strongly against the grantor. See *dem. Davies v. Williams*, C. B., T. 28 G. 8, 1 H. Bl. 26. This case was followed by that of *Lane v. Lord Stanhope*, B. R., T. 35 G. 8, 6 T. R. 345, where it was held, that the words "all my manors, messuages, or tenements, houses, farms, lands, woodlands, hereditaments, and real estate whatsoever," passed a renewable church lease for 21 years, as well as the freehold lands. The Court relied in a great degree upon the introduction of the word *farms* (see 9 East, 448). In remarking upon the case of *Pistol dem. Riecardson*, Lord KENYON said, "I do not wonder that this Court determined the case of *Pistol v. Riecardson* with reluctance; for it appears that that case came before the Court at several different times. I only lament that the case of *Addis v. Clement* was not then cited, for Lord MANSFIELD seemed to think himself pressed by a torrent of authorities to decide contrary to his better judgment; and I cannot forbear thinking that if *Addis v. Clement* had been then mentioned, the Court would have decided the other way with less reluctance." In these observations GROSS, J., coincided, but LAWRENCE, J., remarked that the case was not contrary to, but reconcilable with *Addis v. Clement*, for that the latter contained "[*369] words, "or possessed of," which are properly more applicable to leaseholds than to freeholds. The authority of the rule in *Rose v. Bartlet*, which had suffered so much in *Lane v. Lord Stanhope*, was again established in *Thompson v. Lady Lawley*, C. B., M. 41 G. 8, 2 Bos. & Pul. 303, where it was held, that under a general devise of all manors, messuages, lands, tenements, and hereditaments, leasehold messuages would not pass, unless it appeared to be the evident intent of the testator that they should pass. Lord ELDON, C. J., in delivering his judgment, said, this was followed by the case of *Pistol v. Riecardson*, which appears to me to be a case of great authority. Lord MANSFIELD was very unwilling to come to the decision which he ultimately did. The case was argued twice before him. It has been supposed indeed that his Lordship was not aware of the case of *Addis v. Clement*. Whether his Lordship would have come to a different determination had the case of *Addis v. Clement* been cited,

or whether a distinction so satisfactory as to be confidently acted upon, is to be found between the two cases, I do not feel myself bound to examine; but it does not appear to me that any very useful purpose would have been served by a contrary decision, considering how short a time even in that case the freehold and leasehold estates would probably have gone together." The same learned Judge, when Chancellor, again recognised the case of *Pistol dem. Randal v. Riccardson*. "As to what Lord KENYON says upon that case, supposing that Lord MANSFIELD's opinion would have been different if *Addis v. Clement* had been adverted to, I am not quite sure of that. I should not have followed *Addis v. Clement*." *Watkins v. Lea*, Cane. 1802, 6 Ves. 641.

Many cases have arisen in equity as to the passing of copyholds under general words, in which the doctrine in *Rose v. Bartlet* has been incidentally considered. See *Lindopp v. Eborall*, 1790, 3 Br. C. C. 188; *Watkins v. Lea*, 1802, 6 Ves. 638; *Blunt v. Clitherow*, 1805, 10 Ves. 589; *Church v. Mundy*, 1808, 15 Ves. 396; *Hodgson v. Merest*, 1821, 9 Price, 556. See also *Doe dem. Belasyse v. Lucan*, B. R., E. 48 G. 3, 9 East, 448.

That leases for lives are not within the rule laid down in *Rose v. Bartlet*, see *Watkins v. Lea*, 6 Ves. 642; *Fitroy v. Howard*, 3 Russ. 225.

*BROWN v. PHEPOE.¹ Feb. 3.

[*370]

Affidavit of debt by third person, that defendant is justly indebted to the plaintiff in certain sums, and that the deponent is more strongly and better assured that the said sums of money are due, by means of deponent's having transmitted to him and in his custody certain documents. Held insufficient.

BOWER moved to discharge the defendant, on account of the insufficiency of the affidavit to hold to bail, which was as follows: "That it appeared to the deponent, and he verily believes, that the defendant is justly indebted to B. Brown, of Charlestown, South Carolina, this deponent's brother, in, &c., so much for sugar shipped by plaintiff, and received by defendant;—so much for interest thereon;—so much for part purchase-money of a house and land sold by defendant, under a letter of attorney, for plaintiff, and received by defendant; and this deponent saith, he is the more strongly and better assured that the said sums of money are due from defendant to plaintiff, as aforesaid, by means of this deponent's having transmitted to him, and in his custody, an authenticated copy of the original letter of attorney, made by plaintiff to defendant as aforesaid, and authenticated copies of the conveyances executed by defendant to the purchaser, certified to be copies under the seal of S. Carolina; and also by defendant having, in his custody, an affidavit of R. Stewart of Charlestown, certified, &c., of the payment of the money aforesaid to defendant; and also by means of a letter of attorney, lately transmitted from plaintiff to defendant, empowering him to sue defendant, &c.; whereby this deponent is fully satisfied that defendant did not account for and pay to plaintiff the said several sums of money by defendant received for plaintiff's use as aforesaid." *Bower* having cited *Pomp v. Ludvigson*, B. R., M. 32 G. 2, 2 Burr. 655, in support of his application,

Law showed cause in the first instance, and said that the affidavit in this case was different from that in the case cited, for it was positive as to belief, and only added as a confirmation that the deponent had seen certain documents.

Lord MANSFIELD said, that, in the case of executors, a positive affidavit was dispensed with, notwithstanding the words of the act, because it was impossible that they could *swear positively; but in the case of debts [371] owing to persons abroad, as here, another mode was open by application to a judge at chambers, who would receive an affidavit made abroad.

Rule granted.²

¹ S. C. cited 1 Tidd's Pr. 182, 8th ed.

² See *Bovara v. Besesti*, B. R., M. 24 G. 3, ante. Tidd's Pr. 182, 8th ed.

JOHNSON v. SPILLER. Feb. 3.

(Reported, ante, vol. i., p. 166 (n).)

BARWELL v. ANNE BROOKS.¹ Feb. 4.

A feme covert living separate from her husband, and having a competent separate maintenance duly paid to her, may be sued alone on a contract made by her for necessaries.

THIS was an action for victuals, drink, and other necessaries furnished to the defendant. The declaration also contained a count for goods sold and delivered, and the other common counts. The defendant pleaded her coverture in bar. Replication that the said Anne, and the said James, her husband, long before the promises of the declaration mentioned, and before the exhibiting of the plaintiff's bill, viz., on the 18th of June, 1778, were parted and separated, and lived separate and apart from each other, and always from thence until the exhibiting of the plaintiff's bill, did, and still do, live separate and apart from each other; and the said Anne, during all that time, had a competent separate maintenance and provision allowed her by her said husband, and duly paid to her for her separate support and maintenance; and that the said Anne, during that time, made the said promises and undertakings in the declaration mentioned, for necessaries found and supplied by the said plaintiff for the said Anne upon her own account and credit, and for her own separate support and maintenance. To this replication the defendant demurred generally.

Law, in support of the demurrer.—The maintenance here is not stated to have been secured by deed, as in Lady *Lanesborough's case, B. R., [*372] H. 23 G. 3, ante, p. 197. It may be a mere temporary precarious allowance, liable to be resumed at the will of the husband. Nor is it stated that the husband is out of the realm, or not subject to the process of the Court. No case can be cited in which a married woman has been held liable, where the husband was amenable to the process of the Court. There are two grounds upon which this demurrer may be supported:—1. That this does not appear to be such a maintenance as the creditors can get at, or the wife compel the payment of; 2. That the husband himself is amenable. [BULLER, J.—Should you not have taken issue on the maintenance not being sufficiently secured?] Not unless it be sufficiently averred. In *Hatchett v. Baddeley*, C. B., E. 16 G. 3, 2 W. Bl. 1079, BLACKSTONE, J., says, "it seems to be supposed by the argument that if the husband is not bound to pay this debt, it follows that the wife may be compelled alone. But this is no legal consequence." In *Lean v. Schutz*, C. B., E. 18 G. 3, 2 W. Bl. 1195, it was held that at all events the husband must be joined for conformity, and the Court said, "There is no instance in the books of an action's being sustained against the wife, the husband being living, at home, and under no civil disability." There is no case, even in equity, where the husband is not joined, and only one where actual service upon him was dispensed with, and that was on account of absence in Jamaica. *Dubois v. Hole*, 2 Vern. 613, *Kenge v. Delaval*, 1 Vern. 326. Even after separation a husband has an interest in the person of his wife. After a divorce *a mensa et thoro*, if property come to the wife it belongs to the husband.

Wood, contra.—From the earliest times many exceptions have been admitted to the general rule, that a feme covert is not liable to be sued. One of these exceptions is where a separate maintenance is secured to her. It is

¹ S. C. Co. B. L., 28, 1st ed., shortly reported without the arguments of counsel.

immaterial whether the maintenance be by deed or not. It is enough that it is averred to be duly paid. Issue might have been taken upon the due payment of the maintenance. In *Ringsted v. Lady Lanesborough*, the deed by which the maintenance was secured was not set out; it was only stated that it was secured by deed. Here it is averred that a competent separate maintenance and provision was allowed, and *that averment is sufficient. [*373] It is not easy to understand what is gained by the argument that the husband is amenable to the process of the Court. It is clear, and indeed it has been so determined in an action against this very husband, that he is not liable. In *Hatchett v. Baddeley*, there was no determination on the general question, and in *Lean v. Schutz*, the Court got rid of the case on the point of conformity. In *Turtle v. Lady Worsley*, ante, p. 290, the plea of coverture was in abatement instead of being in bar, which was held bad, and there was the same error in *Lean v. Schutz*. With regard to feme sole traders in London, the execution goes against the wife only, but it is part of the custom that the husband shall be joined as defendant. The principles upon which *Ringsted v. Lady Lanesborough* was decided, apply in this case, and the demurrer must be overruled.

Law, in reply. In the actions against a feme sole trader in London, the husband is joined by the common law, and not by the custom. The custom merely is that the wife may be sued. *Langham v. Bewett*, C. B., E. 3 Car. Cro. Car. 68.

LORD MANSFIELD.—The question is, whether a married woman can be sued for a debt on her own contract? The general principle of law is against her liability. But *quicquid agant homines* is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind. Hence, centuries ago, exceptions have been engrafted upon this rule, as in the case of abjuration, &c. The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law. They may be separated, not only between themselves, but as regards third persons. It was admitted that where the separate maintenance is known to the creditor, the husband is not liable. The whole question was fully gone into in the case of *Ringsted v. Lady Lanesborough*, and an objection was taken then, as well as in the present case, that the husband ought to have been joined. I have no difficulty in getting over that, notwithstanding the authority. Why should the husband be joined to nonsuit the plaintiff? He is not liable. The next objection was that the maintenance should appear to be by *deed. It is, however, sufficiently alleged and admitted. Then, it is said, that the husband resides in England, but [*374] though he does, he is not liable; and, therefore, I think, on the authority of *Lady Lanesborough's* case, that judgment must be for the plaintiff.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—In *Ringsted v. Lady Lanesborough*, all the circumstances were thrown together in the judgment, but the main circumstance was that the husband was not liable. The question of conformity was also discussed pretty fully in that case. It is now pressed only on authority. Is there any case in which you must make a party to the suit, a person against whom you cannot have judgment? None is produced. The case of the feme sole merchant in London goes wholly on the custom, and not on the common law attaching upon the custom. I consider *Lean v. Schutz* no authority on the point of conformity. Judgment for the plaintiff.¹

¹ Vide ante, p. 204, note (c).

PHILIPS and Another v. BAILLIE. Feb. 6.

The defendant having chartered a ship put her up at Lloyd's, with notice that she would sail with the first convoy. The plaintiffs shipped goods on board, and insured them with a warranty that the ship should sail with convoy. Before the ship sailed the preliminaries of peace were gazetted, and hostilities on the part of the king's subjects were forbidden, and ships taken by the various powers within certain limits and certain times were to be restored. Government appointed no convoy, and the ship sailed without, but with French, Spanish, and American passports. No notice was given by the defendant to the plaintiffs that the ship was about to sail without convoy. The ship was run down and lost the day after she sailed. In an action against the defendant for breach of his contract, whereby the plaintiffs were deprived of the benefit of their policy, held that the plaintiffs were entitled to recover.

THIS was an action of assumpsit tried at Guildhall, at the sittings after Michaelmas Term, before BULLER, J. The first count of the declaration (which was the most material) stated that the defendant was possessed of a ship called the *Vigilant*, then about to sail from London to St. Lucia, and in consideration that the plaintiffs would ship goods on board her, the defendant undertook that the ship should sail with convoy from London to St. Lucia. That the plaintiffs did ship goods of the value of £1000, and paid the defendant £100, being a reasonable freight. That the plaintiffs, by a policy of insurance, caused their said goods to be insured to the value of £800, and by the policy warranted that the said ship should sail with convoy from, &c.

Yet the defendant, not regarding, &c., did deceive the [*375] plaintiffs in this, that the said ship, without the knowledge or license of the plaintiffs, sailed on her said voyage without convoy, and was afterwards run foul of by another ship and sunk, and that the goods were thereby lost. And that by means of the ship having so sailed without convoy, contrary to the defendant's undertaking, and to the warranty contained in the said policy, the plaintiffs were deprived of all benefit of the said policy, and have not, nor can receive any benefit from it. The defendant pleaded the general issue, and the jury found a verdict for the plaintiffs, damages £800, subject to the opinion of the Court on the following case:

The ship *Vigilant* was chartered, on the 26th October, 1782, by the defendant, and was put up at Lloyd's coffee-house for freight, with notice that she would sail with the first convoy. On the 10th January, 1783, the plaintiff shipped goods on board the said ship on freight, and caused £800 to be insured on the said goods, and warranted the ship to sail with convoy. The ship sailed from London, and arrived at Spithead on the 20th January, 1783, after which time no convoy appointed by the government ever sailed; but, on the 8th March, 1783, a copy of the following order was sent, by the Lords of the Admiralty, to John Young, Esq., commanding his majesty's sloop the *Speedy*, at Spithead. [The order directed Captain Young to proceed to sea the first opportunity, with the *Speedy*, &c., taking under his convoy such merchantmen, bound to the West Indies, as should choose to accompany him, and to conduct them to Barbadoes and Jamaica.] On the 15th February, the proclamation and notice appeared in the London Gazette. [The proclamation recited the signature of the provisional articles with America, and of the preliminaries with France and Spain; that it had been agreed by his majesty, France, Spain, Holland, and America, that ships should be restored on all sides, those that were taken in the Channel and North Sea, twelve days after the ratification of the preliminaries; from the Channel to the Canaries one month; from the Canaries to the equator two months; and, for all the rest of the world, five months. That the ratifica-

tions were exchanged with France on the 3d February, and with Spain on the 9th, and that hostilities should cease with Holland and America at the same time as with France. It then charged all officers by sea and land, "and all our subjects whatsoever," *to forbear all hostilities against France, [*376] Spain, Holland, and America after the times above-mentioned. The notice was, that his majesty in council was pleased to declare and order, that, for the convenience and security of the commerce of his subjects during the cessation of arms, passes will be delivered, as soon as they can be interchanged, to such of his subjects as shall desire the same for their ships, goods, merchandise and effects.] The defendant caused his own policy of assurance of goods on board the *Vigilant* to be altered by striking out the warranty as to the ship's sailing with convoy, but did not give any notice to the plaintiffs that she would sail without convoy. The ship sailed from Spithead without convoy, on the 4th March, by the directions of the defendant, and was next day run down by the *Minerva* frigate. She sailed with French, Spanish, and American passports, but no Dutch passports, none having been issued at that time.

It was admitted in the argument, that an action on a similar policy, on the same ship, had been brought against the underwriters, in which the plaintiff failed on account of the warranty. The name of that cause, which was tried at the sittings in Michaelmas Term last, was *Robinson v. Vaughan*.

S. Heywood for the plaintiffs. It will be said, on the other side, that the contract as to the sailing with convoy was dissolved by the peace, and the subsequent proclamation. But what is the effect of that proclamation? It prohibits hostilities against the enemy, but there is nothing in it to prevent hostilities on their part. It mentions different times of cessation for different latitudes. Some the ship must have passed through; others she might have been driven into. But even in times of peace the warranty might operate. It is said in *Beawes*, title *Convoys and Cruisers*, (p. 261, ed. *Dubl.* 1795), that "even in times of peace, convoys are ordered by the government, to guard and defend our trading vessels from the assaults of pirates, or encroachers on our commerce, more especially in our fisheries and other parts of the West Indies, where they may be exposed to such attacks by commercial intruders." A contract like this, therefore, is not necessarily dissolved by the cessation of hostilities. But it may be said that, supposing the warranty to continue, it has been complied with by putting *passports on board. In *Pawson v. Watson*, K. B., E. 18 G. 3, Cowp. 787, it is said, "there is no distinction better known than that which exists between a warranty or condition which makes part of a written policy, and a representation of the state of the case. When it is part of the written policy, it must be performed; as, if there be a warranty of convoy there must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed." [Lord MANSFIELD.—This is not a warranty, but an agreement.] A warranty and a representation are words appropriated to policies of insurance; in other cases, every agreement is a warranty. These advertisements of ships are always considered as specific agreements. (*Gordon v. Morley*, K. B., sutt. after M. T., 1746; *Beawes*, 320, ed. *Dubl.* 1795.) The meaning of the agreement was to secure the ship against capture in a particular way. The defendant has taken upon him to substitute another. Had this ship met with a Dutch cruiser, she had no protection. But supposing that it was not necessary for the defendant to comply strictly with the terms of the agreement, the defendant ought still to have given notice of the alteration. In consequence of that want of notice, the plaintiffs have not procured an alteration of their policy, and cannot recover upon it. It cannot be said that the plaintiffs ought to have taken notice of the procla-

mation, for, notwithstanding the proclamation, the ship might have sailed with convoy, since convoys are appointed not only as a protection against capture by an enemy, but also against pirates and accidents.

Wood, contra.—The distinction between warranties and representations must be admitted, but the contract in this case resembles the latter rather than the former. The contract between these parties was by bill of lading, and convoy was mentioned only in the paper at Lloyd's. That therefore was collateral to the contract, and like a representation. It must, therefore, be complied with substantially, and without fraud. It is clear that, at the time when the advertisement was stuck up, it was the intention of the owner to sail with convoy. There is no fraud in his non-compliance with that undertaking, which has been rendered unnecessary by public events over which [*378] he had no control. The undertaking was, *to sail "with the first convoy;" but that undertaking has reference to the situation of the country. The convoy was to be appointed by government; and, as none was appointed, the defendant performed his contract *cy pres*. The damage was not such as could have been avoided had the vessel sailed with convoy, for she was run down in the channel by an English frigate. But it is said that the defendant ought to have given notice. If, indeed, this had been a matter of private nature, notice might have been requisite, but here the fact of which notice was to be given was public and notorious. The passports which this vessel carried were better than convoy, and in many cases the underwriters abated the premium on account of the change. It is said that the vessel might have got into latitudes where the enemy were not restrained from capture, but it is a sufficient answer that the accident happened before she got into any such latitudes.

Lord MANSFIELD.—The defendant put up the ship at Lloyd's for freight, "to sail with the first convoy." He therefore undertakes, to all the world, to sail with convoy, and on the faith of this undertaking, the plaintiffs, who insure their goods, warrant in the policy that the vessel shall sail with convoy. She sails without convoy, and is lost by accident. The insurers defend themselves on the ground of a noncompliance with the warranty, and the plaintiffs are nonsuited and bring this action. Their loss is the amount of the sum which they fail in recovering from the underwriters. The doctrine of warranty and representation applies only to policies, and confounds any other subject. Here is an agreement. Has the defendant performed it? No. Has any damage been sustained? Yes. What excuse is there? None. Four days after the vessel had sailed a convoy was appointed. It is not true that there was no necessity for a convoy; hostilities had not ceased in all latitudes. Convoys are not merely a protection against enemies, but may be necessary in time of peace. At all events it was the duty of the defendant to give notice to the plaintiff so as to enable them to alter their insurance. He altered his own. There is nothing to make a question.

Postea to the plaintiffs.¹

¹ See *Snell v. Marryat*, B. R., 48 G. 3; *Abbott on Shipp.* 212; *Saunderson v. Busher*, 4 Campb. 64 (n.).

[*379] *The KING v. JOHN EYLES, Esq. Feb. 7.

(Reported, CALDECOTT, 407.)

The KING v. The Inhabitants of ST. ANDREW, HOLBORN. Feb. 7.

(Reported, CALDEBOOTT, 408.)

The KING v. The Corporation of BRIDGEWATER. Feb. 9.

Where the mayor who presides at the election of a new mayor is only mayor *de facto* and not *de jure*, and is subsequently removed by judgment of ouster, the election of the new mayor is void, and the Court will grant a mandamus for the election of a new mayor, under stat. 11 G. 1, c. 4, although a *quo warranto* is depending against the present mayor.

A RULE was obtained for a mandamus to the senior alderman, &c., of Bridgewater to go to the election of a mayor under the statute, 11 Geo. 1, c. 4. The ground of the application was that the present mayor's election was void, he having been elected at a meeting where the former mayor presided, and such former mayor having been since ousted by *quo warranto*.

Morris and Rooke, Serjeants, against the rule. *Non constat* that the judgment of ouster in the *quo warranto* was valid or on fair grounds, and though the defendant did not controvert it, yet the present mayor ought to be allowed to do so, and is ready to go into such proof. Although it has been taken for granted, that if the mayor is ousted who presided at any election, the election of all persons taking place before him is bad, yet there is no decision to that effect, and it seems reasonable that where the election is on a charter-day, and the bad mayor only presides ministerially, and not at a meeting called by his act, if the persons elected have a majority, their election should stand. [BULLER, J.—Is there any case in which it has been held that an election at which a mayor *de facto*, but not *de jure*, presided has been held good?] It was so held at Nisi Prius by Mr. Justice BLACKSTONE in a case of the King v. *Spearing,¹ at Winchester. So far from the title of the present mayor being clearly bad, the prosecutors have obtained an in- [*380] formation in the nature of a *quo warranto* against him, and though a plea has been put in, they refuse to wait the event of that trial.

Grose, Serjeant, and *Lawrence*, contra.—The question is, whether there has been a due election. It is a first principle of election law that an election under a bad mayor is bad. That the mayor under whom the present mayor was elected was a bad mayor appears on record; and there is no pretence for saying that the judgment of ouster was obtained collusively. The present mayor might have come in, and have prayed for liberty to defend the former mayor's title in the *quo warranto*. Not having done so, he cannot now dispute the judgment of ouster. The act of election is not simply ministerial, as in some cases the act of a justice of the peace, nor can it make any difference that the election took place on the charter-day; for where the presence or consent of the presiding officer is necessary, as it is on the charter-day, if he is a bad mayor, what is done at such a meeting is bad. In order to support the present mayor's title in pleading, it would be necessary for him to state that at his election the former mayor presided, upon which issue might be taken, and the judgment of ouster would support the negative of that issue, see *The King v. Smith*, B. R., T. 56 G. 3, 5 M. & S. 271.

LORD MANSFIELD having stated the occasion and history of the statute, 11 Geo. 1, c. 4, said, It has always been understood that when a bad mayor presides, all elections under him are bad. It is clearly so when the meeting is not on the charter-day, but called under the statute, and I can see no reason for the difference attempted to be set up. Under the statute, "if no election shall be made," or being made, "shall afterwards become void," (which must mean, shall turn out to have been void by subsequent judgment of ouster, for, if good at first, it could not become void *ex post facto*), &

¹ See a short note of this case 1 T. R. 4 (n.), from which it appears that the Duke of Bolton, who had been mayor *de facto*, was dead, and BLACKSTONE, J., said he would not suffer the title to be impeached after the death of the person from whom it was derived.

[*381] remedy is provided; either, 1. If there has been no *election, that the corporation must meet next day; or, 2. If there is no election pursuant to the directions of the statute; or, if the election becomes void, a mandamus may be applied for. The Court will grant the mandamus in the first instance, without waiting for the ouster of the persons elected, because the mandamus concludes nothing; but, on the trial, the validity of the elections may be gone into. In *The King v. Cambridge*, the mandamus issued without waiting for a *quo warranto* against the mayor *de facto*, who was abroad, and could not be sworn in, and therefore was chosen merely that the old mayor might hold over.

WILLES, Justice.—I am of the same opinion. The *quo warranto* against the mayor *de facto*, which the counsel against the rule wished should be tried first, was not pleaded to until after this rule was applied for.

BULLER, Justice, of the same opinion. I think that in *The King v. Cambridge*, the Court said that they would not grant a mandamus under the act, except in a clear case; and there is good reason for this, because when the mandamus issues, if the majority of the electors choose to obey it, the actual mayor, though he may have a right, cannot help it. See *The King v. Newsham*, B. R., E. 28 G. 2, Sayer, 211; *The King v. Banks*, B. R., H. 4 G. 3, 3 Burr. 1454; *The King v. Mayor of Colchester*, B. R., H. 28 G. 3, 2 T. R. 259; *The King v. Mayor of York*, B. R., T. 32 G. 3, 4 T. R. 699; *The King v. Corporation of Bedford Level*, B. R., E. 41 G. 3, 6 East, 360. But I think the present is a clear case. There is no denial by the defendants of the grounds made; and as to the point of the bad mayor presiding, the current of decisions has been, that, in all such cases, elections under him are void. See *The King v. Smith*, B. R., T. 56 G. 3, 5 M. & S. 271; *The King v. Hughes*, B. R., T. 6 G. 4, 4 B. & C. 378. And the reason of the thing is so, for without his presence there is no corporate meeting. He is an integral part of the corporation. With regard to the case of *The King v. Spearling* (vide *ante*, p. 380, n), tried at Winchester, before BLACKSTONE, J., which has been mentioned by Mr. Morris, my memory fails me much if the ground the Judge went upon was not this: he said, "These are mere issues of fact. We are only to try whether, in fact, the Duke of Bolton was Mayor of Winchester, and have nothing to do with objections to him in point of [*382] law." Whether the learned Judge was *right in that opinion is a question, but it was acquiesced in, and the case never moved in this Court, which is a sufficient reason why it should not bind as an authority. [It was stated by Morris, that the Duke of Bolton had taken a colorable residence, to qualify him to be chosen mayor.] Rule absolute.

Whereupon *Lawrence* prayed a writ to go to the subsisting corporation, to elect a mayor, and a separate writ to the mayor, &c. (to be used when the mayor should be elected), to elect four capital burgesses. The reason of there being two separate writs was, that the capital burgesses were not annual officers, and therefore not within the statute 11 Geo. 1, c. 4. In the *Scarborough case*¹ there was but one writ, all the officers to be elected being annual. The rules were accordingly directed as prayed, and a person was named to give notice.

¹ B. R., H. 16 G. 2, 2 Str. 1180. In Mr. Ford's note of this case, it is not said that the officers were annual, 8 East, 272 (n); and in *The King v. Thetford*, 8 East, 271, the Court of King's Bench held that the statute was not confined to annual officers.

ELAN v. REES.¹ Feb. 11.

Where the plaintiff resides permanently abroad, the Court will stay proceedings till security is given for costs.

COWPER had obtained a rule to show cause why the proceedings in this action should not be stayed till the plaintiff, who resided in Dominica, should give security for costs. He said he was aware that this motion had been often refused (except in cases of ejectment), but that it had been granted last term in a case similar to the present, though strongly opposed by *Baldwin*.

Cause was now shown, and several cases cited, notwithstanding which the rule was made absolute, *Cowper* having *taken a distinction to which [383] *BULLER, J.*, and the Court assented, between a plaintiff who resides permanently abroad, as in this case, and one who is abroad *animo revertendi*. Vide *Anon. B. R.*, H. 1815, 2 Chitty's Rep. 152; *Parquot v. Eling, C. B.*, H. 29 G. 3, 1 H. Bl. 106. Rule absolute.²

¹ S. C. cited 1 Tidd's Pr. 580, 8th ed.

² See Tidd's Pr. 580, 8th ed.; *Ganeaford v. Levy, C. B.*, M. 38 G. 3, 2 H. Bl. 118, 4th ed. and the note there.

DOE v. JOHNSON and Others.¹ Feb. 11.

Where there is an irregularity in the notice at the foot of the copy of a latitat, which is served in November, an application to set aside the proceedings for irregularity made at the end of Hilary Term is too late.

ACTION for the costs of an ejectment. Motion to set aside proceedings for irregularity, on the ground that the name of the defendant was not in the notice at the foot of the copy of the latitat, as required by the form prescribed in 5 Geo. 2, c. 27.

Bower showed cause.—He said he supposed a case would be relied on, of *Behema v. James, C. B.*, T. 18 & 19 G. 2, 1 Wils. 104, which he hoped could not be law, it being absurdly strict, but that at any rate the objection came too late, for the writ was served in November, and the declaration delivered last term.

The Court did not seem to deny the case in *Wilson*, but thought the defendants came too late.

Lord MANSFIELD said he would not allow them to walk slow.

Rule discharged.²

¹ S. C. cited Tidd's Pr. 166, 8th ed.

² See *Worgman v. Plank, C. B.*, H. 29 G. 3, 1 H. Bl. 100; *Jones v. Armytage, C. B.*, M. 40 G. 3, 2 Bos. & Pul. 38; *Wilson v. Stafford, B. R.*, H. 1820, 2 Chitty's Rep. 355; *Harden v. Wood, B. R.*, T. 1819, 1 Chitty's Rep. 500, 1 Tidd's Pr. 166, 8th ed.

WHITFIELD v. HUNT. Feb. 12.

(Reported, ante, vol. ii. p. 727 b, note [†155]).

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

IN THE TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

THE KING *v.* ROBERT LLOYD and Others. May 1.

(Reported, CALDWELL, 415.)

CLEMENTS *v.* PASKE.¹ May 3.

Devise to the first and eldest son of the body of J. C. lawfully issuing or issued, and for default of such issue then likewise to the second, third, and every other son of J. C. successively, and in remainder the one after the other as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of such second, third, or other son or sons, &c., and in case of such issue male failing by the said J. C. then, &c. Held that the eldest son of J. C. took an estate tail.

THIS was a case from the Court of Chancery, the material parts of which were as follows :

James Clements, by his will, dated 7th May, 1767, after giving several estates to his nephew, James Clements, and several pecuniary legacies, devised as follows :—" *Item* all my other real or leasehold estates whatsoever, I give to Samuel Cockerill and George Cockerill, and their heirs for and during the life of my nephew, James Clements, to the intent to support the contingent remainders in this my will, but in trust nevertheless to permit my said nephew to receive the rents and profits during the term of his natural life ; [*385] and from and after his decease I devise all the said copyhold and leasehold estates last mentioned to the first and eldest son of the body of my nephew, James Clements, lawfully issuing or issued ; and, for default of such issue, then, likewise, to the second, third, and every other son of my said nephew, James Clements, successively ; and in remainder, the one after the other, as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of such second, third, or other son or sons, the eldest of such sons, and the heirs

¹ S. C. cited 1 M. & S. 180.

male of his body, being always preferred, and to take before any of the younger sons and the heirs male of his body. And in case of such issue male failing by my said nephew, James Clements, then I give, &c., to the first and eldest son of the body of my nephew, Matthew Clements, lawfully issuing, and to the heirs male of the body of such first son, lawfully issuing; and, for default of such issue, then, likewise, to the second, third, and every other son, &c. (in the same words);" and on failure of issue male of Matthew Clements, remainder to the daughters of Matthew Clements, remainder over.

The case also stated a will of testator, executed about a year before, which, with respect to the lands in question, was exactly in the same words as above, except that, after the limitation to the first son of James Clements, it added the words, "and to the heirs male of the body of such first son, lawfully issuing or issued."

The copyhold lands had before been surrendered to the use of the testator's will. The testator died soon after the making of his will, and his nephew, James Clements, the father of the plaintiff, entered, and died in 1779. The plaintiff, who at his father's death was twenty-three and upwards, was the only son by his father's first wife, and the only child his father had in the testator's life. James Clements left a son and five daughters by his second wife, all living.

The plaintiff entered, and suffered a recovery of the freehold, and also of the copyhold, in the Lord's court, to the use of himself and his heirs. James Clements, the plaintiff's father, was heir-at-law to the testator.

The question for the opinion of the Court was, what estate the eldest son of James Clements took under the will.

**Troward*, for the plaintiff.—The eldest son of the testator, James Clements' nephew, took an estate in tail male under the will. It is [*386] true in legal strictness, that where there is a devise to a man without any words of inheritance superadded, he can only take an estate for life; but words of inheritance will be supplied where that is the apparent intent of the testator, for the construction must be agreeable to the intent of the testator, collected from the will; *Evans v. Astley*, B. R., M. 5 G. 3, 3 Burr. 1570. Had the testator meant to give an estate for life to the eldest son of his nephew, he would have given it in the same words as he used in another part of his will, where he gave an estate for life. The words "in case of such issue male failing by my said nephew, James Clements," show that the testator did not intend that the estate should go over until failure of issue male of James Clements. The words "then likewise," &c., are to the same effect.

Wood, contra.—The eldest son of James Clements takes only an estate for life. The first will, which was revoked, must be laid out of the case, and cannot supply any evidence of the testator's intention when making the will in question. It is possible that it may have been the intention of the testator to give an estate tail, but there are no words in the will from which such an intention can be collected. *Voluit non dixit*. The use of the word such in the clause mentioned on the other side respecting the failing of issue is very material, and confines the operation of that clause to the issue of the second and other sons. The word "likewise" is relied upon; but that construction is too far-fetched. It is no more than an introduction to the devise, like *item*. He cited *Doe dem. Briddon v. Page*, B. R., M. 24 G. 3, ante, p. 294, 1 B. & P. n. S. C.; *Keene dem. Pinnock v. Dixon*, B. R., M. 24 G. 3, ante, p. 313, 1 B. & P. n. S. C.

Cur. adv. vult.

Lord MANSFIELD.—There is no limitation after the devise to the first son, but there is after the devises to the second, third, and other sons. In the construction of wills it is necessary to avoid two extremes. The first is that

of arbitrary conjecture, for the Court cannot make a will; the second, that of strictness, which in consequence of a slip in technical or positive expression [*387] may prevent a meaning *evident, and such as no man can doubt, from taking effect. This will is in strict settlement, which is a form well known, and always in the same words. It is copied from a former will. The word "likewise" makes it the same as if after giving estates tail to the second, third, and other sons, the testator had said, I mean to give the eldest son the same estate. We have certified accordingly.¹

¹ See *Doe v. Hallett*, B. R., H. 48 Geo. 3, 1 M. & S. 124; *Langston v. Pole*, C. B., M. 9 G. 4, 5 Bingh. 228.

BATES *v.* JENKINSON. May 3.

(See 6 T. R. 618, 257; 1 Tidd's Pr. 161, 8th ed.)

The KING *v.* The Inhabitants of ASHTON UNDERHILL, and
The KING *v.* The Inhabitants of CHARLTON. May 5.

(Reported, CALDERCOTT, 416.)

The KING *v.* The Inhabitants of ALTON. May 5.

(Reported, CALDERCOTT, 424.)

BENNETT *v.* JOHNSON. May 7.

Dyers have not a general lien, independent of the usage of trade.

THIS was an action of trover for a quantity of silk, tried before Lord MANSFIELD at Westminster, at the sittings after Hilary Term, when a verdict was found for the plaintiff, subject to the following case:

The plaintiff was in use to send silk to the defendant to be dyed. There was due from the plaintiff to the defendant 17*s.* 2*d.*, for dyeing. The plaintiff sent the silk in question *to be dyed. It was dyed, and 3*s.* 6., [*388] was due to the defendant for dyeing it. The plaintiff tendered the 3*s.* 6*d.*, and demanded the silk, which the defendant refused to deliver unless he were paid the 17*s.* 2*d.*, also.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover; and if the Court should be of that opinion the defendant was to deliver up upon oath all the silk sent to him to be dyed.

The case coming on to be argued by *Mingay* for the plaintiff, and *Gibbs* for the defendant.

Lord MANSFIELD directed *Mingay* to look into the cases, and if he found that a dyer had such a lien upon goods in his hands to dye, as to entitle him to retain for what was already due, then to advise his client not to proceed. —His Lordship added, that if this point was not already determined, it might rest a good deal on the usage of the trade.

The case came on again for argument in this term, when *Gibbs* stated that

¹ S. C., 2 Chitty's Rep. 455.

he was aware of the case of *Green v. Farmer*, B. R., E. 8 G. 3, 4 Burr. 2214. He also referred to another case of *Stanton v. Lane* at Guildhall.

BULLER, Justice.—That went upon usage.—Here there is no usage, and we cannot go out of the case. Judgment for the plaintiff.¹

¹ So in *Close v. Waterhouse*, B. R., T. 42 G. 3, 6 East, 524 n, where the jury negatived any usage conferring the lien, the Court held that dyers had not a general lien. But in *Savill v. Barchard*, 4 Esp. N. P. C. 58, such a lien was established, evidence being given of the course and practice of trade. So in *Rose v. Hart*, C. B. T. 68 Geo. 3, 8 Taunt. 499, GIBBS, C. J., after observing that the case of *Green v. Farmer* had been frequently disregarded, said, "In a case in which I have the brief, and in which case Lord Ashburton was, a special custom for dyers to have their general lien was proved; and, notwithstanding *Green v. Farmer*, that custom was acted upon in that case, and has been many times since recognised." See also *Humphreys v. Partridge*, Montague, B. L. 18 n. As to the evidence of usage sufficient to establish a general lien, see *Rushforth v. Hadfield*, B. R. T. 45 G. 3, 6 East, 326; *Holderness v. Collinson*, B. R., T. 8 G. 4, 7 B. & C. 216.

*BARCLAY and Another v. CUCULLA Y GANA.¹ May 7. [*389]

The master of a general ship, on board of which goods have been laden in the Thames for a foreign port, is liable for the loss of the goods occasioned by a forcible robbery while the ship is lying in the river.

THIS was an action of assumpsit, tried at Guildhall, at the sittings after Hilary Term. The first count stated, that the plaintiffs, being possessed of ten bales of goods, shipped the same on board the vessel N. S. della Concepcion, of which the defendant was master, then lying in the Thames, to be safely carried to St. Sebastian's in Spain, for a certain freight, the dangers of the seas excepted. That the defendant undertook and promised to carry the said goods safely, but that he had not carried them safely. The second count added, that the goods were to be safely kept in the said ship until she set sail, and that the defendant had not safely kept them, &c. There were also the common money counts. The defendant pleaded the general issue, and a verdict was found for the plaintiffs, subject to the following case:

The plaintiffs put on board the defendant's ship ten bales of goods, to be carried to St. Sebastian, for which the defendant gave a bill of lading. The defendant has only delivered eight of the said bales. Whilst the ship lay in the Thames with the goods on board, the defendant, the captain, being on the watch, she was attacked and boarded, about two in the morning, by eleven men, armed with pistols and cutlasses, who took the captain aside, and threatened to murder him if he gave notice to any of his men on board, and took away two of the said bales by force. The action is brought to recover £70. 2s. 3d., the value of the said bales. The question is, if the plaintiffs ought to recover.

Wood, for the plaintiffs.—The defendant is in the situation of a common carrier by land, and is liable for every loss which does not happen by the act of God or the king's enemies; *Morse v. Slue*, B. R., H. 23 & 24 C. 2, Vent. 190, 238; *Coggs v. Barnard*, B. R., T. 2 Ann., 2 Ld. Raym. 918. It is immaterial whether the goods are to be carried by land or by water; but here the ship being in the river Thames, the case is the same as land carriage.

*S. Heywood, contra.—In every case except in that of common carrier, who is liable on the custom of the realm, a bailee is only bound to take as much care of the goods bailed to him as of his own. The

¹ Cited, 1 T. R. 38, nomine *Barclay v. Heygena*.

exception with regard to carriers is not of early date. From the Doctor and Student, it appears to have been formerly held, that a common carrier was chargeable, in case of a loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour. See Jones on Bailments, 103. It is, however, now clearly settled, that a carrier is answerable for a loss by robbery. The reason given is, in order to prevent the combining of carriers and robbers. Here the defendant was not a common carrier. It is neither alleged in the declaration, nor was it proved that he was such. A common carrier is a public officer. The rates to be charged by him are settled by justices of the peace, and goods carried by him are privileged from distress; *Gisbourn v. Hurst*, B. R., H. 8 Anne, 1 Salk. 249. In *Boson v. Sandford*, B. R., H. 1 W. & M., Carth. 59, the ship is stated to have been used for the common carriage of goods, and the declarations against hoymen, in every case, except one in *Wilson, Dale v. Hall*, B. R., M. 24 G. 2, 1 Wils. 281, state them to be common hoymen. The defendant must be charged either upon the custom of the realm, as usually carrying for hire, or upon his express undertaking; *Boucher v. Lawson*, B. R., H. 9 G. 2, Cases temp. Hardw. 199. Now here he is not charged on the custom of the realm, and no express undertaking appears to render him liable in case of robbery. The case of *Morse v. Slue* is certainly against the defendant; but if it came to be now decided, it would receive a different decision. [*Per Cur.* There was no question at the trial as to the ship being a general ship. No doubt she was so. The question was, whether irresistible force is an excuse to the captain of a ship.] The general position, that the master of a ship is liable in all cases, goes too far. If it includes coasters, it ought not to extend to foreign vessels.

Wood, in reply, was stopped by the Court.

Lord MANSFIELD.—It is impossible to distinguish this from the case of a common carrier. At first the rule appears to be hard, but it is settled on [*391] principles of policy, *and when once established, every man con-

Judgment for the plaintiffs.¹

¹ See *Sutton v. Mitchell*, B. R., M. 26 Geo. 3, 1 T. R. 18; *Forward v. Pittard*, B. R., M. 26 G. 3, 1 T. R. 27; *Abbott on Shipping*, 223, 5th ed. The taking by pirates at sea is one of the perils of the sea. *Pickering v. Barkley*, B. R., M. 24 Car. 1, Stiles, 132, 2 Roll. Ab. 248; *Abbott on Shipping*, 254, 5th ed.

CHINNERY v. BLACKMAN.¹ May 7.

The mortgagee of a ship cannot sue in his own name for the freight accruing after the mortgage.

THIS was an action of assumpsit. The declaration contained, 1. A count for freight of goods carried in a ship of the plaintiff, called the *Blizard*, from Antigua to London. 2. The same on a *quantum meruit*. 3. A count for work and labor about the carriage of goods of the defendant in a ship of the plaintiff's from, &c. 4. The same on a *quantum meruit*. 5. A count for money paid. 6. A count on an account stated. The defendant pleaded the general issue. The cause was tried at Guildhall, before Lord MANSFIELD, when the jury found a verdict for the plaintiff, with £76. 9s. 11d. damages, subject to the opinion of the Court on a case which stated,

¹ S. C., 1 H. Bl. 117 (n), nomine *Chinnery v. Blackburne*.

That, by indenture of assignment, dated the 4th of January, 1783, Robert Merrifield, in consideration of £1166. 18s., which he owed to the plaintiff, assigned to her the ship *Blizard*, with the appurtenances, in which indenture there is a covenant from the plaintiff to re-assign the said ship to Merrifield, on payment of £1166. 18s., with interest, on or before the 10th of November following. That, at the time of the execution of the said deed, the ship was in the Thames: that she afterwards sailed to Portsmouth, and continued there till the middle of March, in the possession and under the command of Merrifield, and that the plaintiff did not then take possession thereof. That Merrifield navigated, victualled, and manned the ship, as owner thereof, at his own expense and risk, both from England to Antigua, on her return home. That Merrifield, at Antigua, *gave [392] the command of the ship to Captain Drysdale, and sent her to England, with orders to the captain to address himself to Messrs. Dunlop, of London, merchants, who were to sell her, according to the directions contained in a letter of which the following is an extract: "Antigua, 31st July, 1783. Messrs. J. and R. Dunlop.—This will arrive to you by the *Blizard*, Captain Drysdale, which I have desired him to value himself on you. Am sorry she makes no better freight, as I am obliged to put ballast in her, and, should ships sell well, to have her sold. I think she is worth £1600 sterling. She is well found and strong. Should there be no demand for ships in London, I am to request you will send her out for Antigua and Dominica, provided there is not a load for her at Dominica, as soon as possible, as I shall always be able to load her for that port. Mrs. E. Chinnery has a demand against me for near £1200, which I am in hopes to remit shortly to you or Mrs. Merrifield, so as to pay her. I am, &c., Robert Merrifield." That, in consequence of Mr. Drysdale's application to Messrs. Dunlop, as consignees as aforesaid, to borrow two several sums of £50 each, Messrs. Dunlop advanced the same to him, declaring that they should consider him as responsible for the payment, in case they should not receive the same from the freight or sale of the ship, or by remittance from Merrifield, which sums they afterwards received from Drysdale. That the ship completed the delivery of her cargo on the 27th September, 1783, and the plaintiff took possession of her on the 29th, immediately on receiving information of her arrival in the Thames. That the defendants had goods in the ship *Blizard*, consigned to them on the voyage from Antigua to London, the freight whereof amounts to £76. 9s. 11d., for which the action was brought. That Captain Drysdale had paid for lights and custom-house dues, and for clearing the ship, which was afterwards repaid to him by the plaintiff, who also paid his and the mariners' wages in respect of the voyage from Antigua, to the amount, in the whole, of £234. 7s. 7d., since her taking possession of the said ship. That the plaintiff has since sold the ship by public auction to the best bidder for £710.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Wood, for the plaintiff.—The case is shortly this: The mortgagee of a ship, having taken possession, brings an *action for freight due [393] after the execution of the mortgage, but before his actual possession. The mortgagee is the complete legal owner. The ship was consigned to Dunlop to be sold, but it could not be sold without an assignment of the mortgage, and the money arising from that sale must have been applied to pay off the mortgage. The freight follows, and is incident to the property of the ship. It is like the case of a mortgage of land, where, upon the mortgagee getting possession by ejectment, the arrears of rent are his; and it is no objection that they accrued before he came into actual possession, if they accrued after the date

of the mortgage, though it is true that, if they have been actually paid over to the mortgagor, they shall not be paid again to the mortgagee. A mortgagee of land may even distrain without having had any possession; *Moss v. Gallimore*, B. R., M. 20 G. 3, ante, vol. i. p. 279. There is no difference in the case of a ship. No one else claims this freight; it has not been paid to the mortgagor. The defence to this action is merely to avoid payment of the money. The plaintiff has paid wages to the captain and seamen, custom-house dues, and other charges, in respect of this voyage; and she is entitled, on the other hand, to the benefit of the freight earned.

Chambre, contra.—The present plaintiff is only a mortgagee, and is not entitled to maintain an action in her own name upon a contract made for the benefit of another. No argument has been urged on the other side, except the analogy to the case of rent; but that analogy does not hold, for the reason why the mortgagee is entitled to the rent is, that it is incident to the reversion. If the mortgagor has recovered the rent, the mortgagee has no remedy against him, because he has permitted the tenant to pay it over. If the mortgagor himself occupies the land, he is liable to no account. He is not, strictly speaking, tenant at will, because he is not subject to the payment of rent. Here the mortgagor himself enjoys the ship; he mans and victuals her; he bestows labor and expense on her; and the freight is earned, and the cargo is delivered, before the mortgagee takes possession. Could a mortgagee bring an action in his own name for corn sold by the mortgagor? The contract and the right of suing are personal matters, which cannot be transferred to another. If the benefit to be

[*394] derived from the contract can be transferred, the mortgagee must also bear all losses, and be subject to all the improvident contracts of the mortgagor. A case may be stated which has in fact happened,—that the debt now sued for has been attached by creditors in the Sheriff's Court, and judgment obtained. As to the payment of the wages and charges by the plaintiff, they were paid under a notion that they were a lien upon the ship, and they were paid merely for the purpose of getting possession of her.

Wood, in reply.—Undoubtedly circumstances might arise to vary the case, as the attachment (which can be proved to be fraudulent), or a question of set off; but this is merely a question between the mortgagor and mortgagee. The mortgagor being suffered to remain in possession, is merely the servant of the mortgagee, who shall have the benefit of the contracts made by him. It is said that rent is incident to the reversion. In the same manner, freight is incident to the ship. The mortgagee paying the wages, &c., a payment rendered necessary by the abandonment of the mortgagor, is, by retrospection, in possession from the commencement of the voyage. The plaintiff does not claim as assignee, but as the legal owner, entitled to the earnings of the ship.

Lord MANSFIELD.—The justice of this case, as between mortgagee and mortgagor, who is not a party to this record, struck me very forcibly at first.

This is an action brought to recover money on behalf of a person who is no party to the contract, against one who has contracted with the mortgagor since the making of the mortgage.

The only ground on behalf of the plaintiff is, that the mortgagor in possession is servant to the mortgagee by an implied contract. But this is not the truth of the case. There is nothing said in the deed about the mortgagor continuing in possession. The mortgagor has been put to great expense; and until the mortgagee takes possession, he is owner to all the world, and is entitled to all the profit made.

WILLES, Justice, of the same opinion.

ASHURST, Justice.—I am also of the same opinion. It could not be that the mortgagor should come upon the mortgagee for a loss, or that the owner of the goods should.

BULLER, Justice.—If the mortgagor is to be considered as agent to the mortgagee, he must be considered so *throughout.¹ This cannot be supposed. The payments were made to get possession, but at any rate they could only be used as evidence that the mortgagee was in possession during the voyage. The contrary, however, is stated in the case.

Judgment for the defendant.

¹ It is now decided that the mere legal ownership of a vessel does not make the party liable for the ship's debts, and the proper question in such cases is, "Were the repairs done or the goods supplied on the credit of the legal owner?" See *Jackson v. Vernon*, C. B., 1 H. Bl. 114; *Westerdell v. Dale*, B. R., T. 87 G. 3, 7 T. R. 306; *Young v. Brander*, B. R., M. 47 G. 8, 8 East, 10; *M'Ivor v. Humble*, B. R., T. 52 G. 8, 18 East, 169; *Jennings v. Griffiths*, coram Abbott, C. J., Ry. & Moo. N. P. C. 42; *Harrington v. Fry*, C. B., T. 5 G. 4, 2 Bingh. 179; *Cox v. Reid*, coram Baser, C. J., Ry. & Moo. N. P. C. 199; *Briggs v. Wilkinson*, B. R. T. 8 Geo. 4, 8 B. & C. 80; *Abbott on Shipping*, 17, 5th ed.; and see 4 G. 4, c. 41, § 48; 6 G. 4, c. 110, § 45.

² It has since this decision been held that though the assignee of a ship cannot sue for the freight in his own name, he is yet entitled to it as incident to the ship, and may sue for it in the name of the assignor. *Morrison v. Parsons*, C. B., E. 50 G. 3, 2 Taunt. 407; *Case v. Davidson*, B. R., E. 56 Geo. 3, 5 M. & S. 79, affirmed on error, 2 B. & B. 379.

By the statutes, 4 G. 4, c. 41, § 43, and 6 G. 4, c. 110, § 45, when a transfer of a ship is made only as a security for the payment of debts by way of mortgage, or an assignment to trustees for sale, or a statement being made in a book of registry, and on the endorsement on the certificate of registry to that effect, the person to whom the transfer is made, or any other claiming under him, is not to be deemed the owner, nor is the person making such transfer to be deemed to have ceased to be owner, except so far as may be necessary for the purpose of rendering the ship transferred available, by sale or otherwise, for the payment of those debts, to secure the payment of which the transfer was made. *Abbott on Shipping*, 17. It seems that, notwithstanding these statutes, the mortgagee of a ship is entitled, like any other assignee, to the freight accruing after the mortgage. *Dean v. M'Ghie*, C. B., M. 7 G. 4, 4 Bingh. 45.

ROBERTSON v. TAYLOR. May 7.

(Reported, 2 CHITTY Rep. 454.)

*The KING v. The Inhabitants of FINDERN. May 8. [*396]

(Reported, CALDECOTT, 426.)

The KING v. The Inhabitants of MAGHULL. May 8.

(Reported, CALDECOTT, 429.)

NEVITT v. LADE.¹ May 8.

Where the plaintiff has been non-prossed in the Exch., and afterwards brings an action in K. B., that Court will stay the proceedings till the costs of the former action are paid.

Rous moved to stay proceedings until the plaintiff paid the costs of a non-pross in the Exchequer.

¹ S. C. cited 1 Tidd's Pr. 584, 8th ed.

Philips showed cause, and admitted that if the former action had been in this Court, the application would be right, but it was otherwise where the action had been in another Court; for which he cited *English v. Cox*.¹

The COURT said, that the circumstance of the cause being in another Court made no difference, and that they could not have laid down such a rule as that mentioned by *Philips*. Rule absolute.²

¹ B. R., T. 15 G. 3, Cowp. 322. In this case the former action was brought by another person. See *Lampley v. Sands*, B. R., H. 25 G. 3, 1 Tidd's Pr. 584, 8th ed. post.

² The Court of Common Pleas will stay the proceedings where a former action has been discontinued till the costs are paid. *Parkin v. Scott*, C. B., E. 49 G. 3, 1 Taunt. 566. So in case of a nonsuit in the former action. *Crawley v. Impey*, C. B., T. 58 G. 3, 8 Taunt. 407, 2 B. Moore, 460, S. C. But where the plaintiff had been non-prossed in an action for work and labor, &c., against the trustees of a road, without naming them, though they were not incorporated, and afterwards brought another action against two of the trustees by name, the Court of King's Bench refused to stay the proceedings in the second action till the costs of the former one were paid, observing that this being an action for the recovery of a debt, they would not prevent the plaintiff from trying his cause, unless it appeared to be vexatiously brought. *Gilbert v. Ryland*, B. R., E. 4 Geo. 4, 1 Tidd's Pr. 585, 8th ed.

[397] ALDRIDGE and Another, Assignees of WALL, v. IRELAND,
Esq.¹ May 10.

Where a trader at Bath left her dwelling-house and went to London, for the purpose of persuading a creditor to withdraw his execution, and left word of the place to which she had gone, but failing to procure the withdrawing of the execution, did not return to her dwelling-house—Held, that this was no act of bankruptcy.

A sheriff who levies, and pays over the money to one party where the goods are claimed by another, shall be presumed to be indemnified by the party to whom he pays the money; and the declarations of that party are admissible in an action against the sheriff by the other party.

THIS was an action of trover by the plaintiffs, as assignees of Alice Wall, a bankrupt, against the defendant, the sheriff of Somersetshire. At the trial before Lord MANSFIELD it appeared that the bankrupt resided at Bath, and on Friday the 5th of February the defendant levied, under an execution at the suit of one Clinton, the brother-in-law of the bankrupt, for a very considerable sum of money. On the Sunday following the bankrupt left her house, and went to London (where she appeared in public), to her brother (leaving word of the place she was gone to), for the purpose of getting her brother to withdraw his execution; but not being able to prevail on him to do so, she never returned home. Two letters were read, one from the bankrupt to her brother, dated the 6th of February, stating her wretched condition, and that she did not possess a guinea; and another of the 20th of February, in which Clinton informed one Hunter that his sister had committed an act of bankruptcy, but that his execution was prior to it. It appeared that Clinton had levied to secure himself from acceptances which he had not paid. The defendant sold in March, and before the commission issued against the bankrupt paid over to Clinton, the plaintiff in the action, the sum of £528. The defence was, first, that no act of bankruptcy had been committed. Secondly, that the consideration of the judgment, which was impeached by the plaintiff, could not be gone into in an action against the sheriff, who at the time of the seizure and sale had no notice of any dispute respecting the property. It was also objected that the letter of Clinton was not evidence as against the

¹ S. C. cited 7 T. B. 512, reported 1 Taunt. 278.

defendant; but Lord MANSFIELD said, that he should consider the sheriff as indemnified by Clinton, and that the cause was his, and therefore admitted the evidence.¹ The jury having found a verdict *for the plaintiff, a [*398] rule was granted to show cause why there should not be a new trial, upon the grounds urged at the trial. An affidavit was made in support of the rule, in which the officer swore that he had no indemnity from Clinton, except that he had paid the costs of this action.

Lee, Cowper, Erskine, and Bower having shown cause, and *Peckham* and *Russell* having been heard in support of the rule,

Lord MANSFIELD said, Where a sheriff acts in obedience to a writ, and without notice of an act of bankruptcy pays over the money, he will be protected according to the rules laid down in *Cowper v. Chitty*, B. R., M. 30 G. 2, 1 Burr. 20, 1 W. Bl. 65, S. C.; see *Coppenden v. Bridgen*, B. R., T. 32 & 33 G. 2, 2 Burr. 818, 2 W. Bl. 205, S. C.; *Potter v. Starkie*, B. R., M. 1807, cited 4 M. & S. 260; *Bernasconi v. Fairbrother*, B. R., T. 8 G. 4, 7 B. & C. 379; *Balme v. Hutton*, Scacc. H. 8 and 9 G. 4, 2 *Younge & Jerr*. 101; and *Price v. Hilyar*, C. B., E. 9 G. 4, 4 *Bingh*. 597; but when the sheriff knows of another claim, and may take an indemnity of either, and chooses to pay over the money to one party, an indemnity from that party is always implied. At the trial it was taken for granted that this was the cause of Clinton, the plaintiff in the former action; and the affidavit states that the sheriff has been indemnified by him as to the costs. I shall therefore lay this part of the question entirely out of the case, and shall only consider the act of bankruptcy. I think it is a very doubtful question, and it makes a very strong impression on my mind, that on leaving her house the bankrupt left word where she was going.

WILLES, Justice.—I do not think that this was a departing from the dwelling-house with intent to defraud creditors. Shall not a trader leave his house to consult a friend, or advise with his attorney or counsel? Clinton's letter has been relied on as estopping him from disputing the bankruptcy; but we think it very hard that this should bind him (even supposing that he alone is affected), provided the *Court should be of opinion that there [*399] has been no act of bankruptcy.

ASHURST, Justice.—I think that it was properly left to the jury; but the weight of evidence preponderates against the verdict. It does not appear to me that the departing the dwelling-house was for delay. The bankrupt gave notice where she was going; and her not returning will not make an act of bankruptcy, if her original quitting her house was not so.

BULLER, Justice.—The law is not that a man leaving his house and not returning to it thereby commits an act of bankruptcy. The question always is *quo animo* does he quit it. In this case it does not appear to have been done to delay creditors. She tells where she is going, and her conduct is not inconsistent with her declarations. If it had, that would have been proper for the consideration of the jury; as if she had gone to another house, or concealed herself at her brother's.

Rule absolute.²

¹ "In a case of *Dyke v. Aldridge* before Lord MANSFIELD, where one of the parties was a sheriff, who was indemnified by a third person, Lord MANSFIELD permitted the declarations of that third person to be given in evidence against the sheriff." 71. R. 665. This is probably the same as the principal case. See also *Smith v. Lyon*, coram Ld. Ellenborough, 1818, 8 *Campb*. 465, *Bell v. Ansley*, B. R., T. 52 *Geo*. 8, 16 *East*, 148; *Harrison v. Vallance*, C. B., T. 8 G. 4, 1 *Bingh*. 45; *Robinson v. Andrade*, cor. Lord Ellenborough, 1816, 1 *Stark*. N. P. C. 372.

² See *Ex parte Osborne*, *Canc*. 1818, 2 *Ves*. & B. 177.

HARPER v. EYLES. May 11.

In an action of trespass for mesne profits by the lessor of the plaintiff, after a recovery in ejectment, it is no answer to the action that a *remittitur damna* has been entered on the record in the action of ejectment.

TRESPASS for mesne profits, tried before WILLES, J., at York. On producing the record in the ejectment, it appeared that there was a remittitur of the damages, which is commonly entered to accelerate the judgment, and prevent a writ of error. It was suggested by some gentlemen, not in the cause, that the plaintiff, by taking this expeditious method, waived the mesne profits, and that he could now recover no damages, and consequently no costs. Upon this WILLES, J. non-suited the plaintiff, with leave to move to set aside that non-suit without costs.

Lee showed cause against setting aside the non-suit, and cited *Aslin v. Packer*, B. R., M. 32 G. 2, 2 Burr. 665.

BULLER, Justice.—If the action had been in the name of the nominal plaintiff, it would be but a mere formal objection, and the Court has always [*400] considered the ejectment as *a particular action founded on a fiction for the purpose of recovering possession only, and it was competent to the plaintiff to bring an action to recover his damages. But here the action being brought by the lessor, it was not even an objection in form.

WILLES, Justice, agreed that the non-suit could not be supported.

Rule absolute.

STAFFORD v. ROUNTICE.¹ May 14.

The Court will not set aside a judgment by default to let in a plea of bankruptcy.

DEBT on bond.—*Baldwin* moved to set aside the judgment which had been signed, and let in the plaintiff to plead bankruptcy, on an affidavit that the judgment had been suffered to go by mistake, and that as soon as it was signed defendant offered to pay the costs.

Couper showed cause.—The Court at first on the particular circumstances granted the rule; but some time after, on consideration, they said it was settled that a judgment could not be set aside to let in a plea of bankruptcy, any more than a plea of the statute of limitations. Rule discharged.²

¹ S. C. cited 1 Tidd's Pr. 615, 8th ed.

² Sed vide *Evans v. Gill*, C. B., T. 87 G. 3, 1 Bos. & Pul. 52, contra.

DURRANT v. SCROCOLD.¹ May 14.

Where the original writ is against two, and the plaintiff declares against them separately, the Court will not set aside the proceedings.

DEBT on bond by original.—*Baldwin* moved to set aside proceedings, on the ground that the original was against two, and the plaintiff had declared against the present defendant alone; and, in another declaration, against the other person named in the original; by which, he said, the king had only one fine instead of two that he was entitled to if there were separate actions.

[*401] *Chambre* showed, for cause, that this was matter for *plea in abatement; and defendant having missed his time, the Court would not

¹ S. C. cited 1 Tidd's Pr. 458, 8th ed.

assist him in this way. *Baldwin* said, it was now settled that the defendant would not have oyer of an original, and therefore he could not plead in abatement. The Court said, the objection was no more than that the writ did not support the declaration, which was a plea, and not a ground of a motion. As to oyer, it was to be demanded on the record, and defendant must take the regular course;—the Court would not assist him. Rule discharged.

STOKES v. SAUNDERS, Administratrix, &c. May 11.

Indebitatus assumpsit for goods sold and delivered. Plea, *plene administravit*. It appeared that the goods were sold to be paid for on the marriage of the plaintiff, which did not happen till fifteen years after the sale. Objection at the trial, that this being a special contract could not be given in evidence under this form of declaration. Verdict for the plaintiff. On motion for a new trial held, that whether the form of the declaration was right or not, the Court would look to the merits; and as no injustice had been done, they would not grant a new trial.

INDEBITATUS ASSUMPSIT for goods sold and delivered, tried at Bedford, before Lord LOUGHBOROUGH. Plea, *plene administravit* only. The contract proved was a purchase of cattle fifteen years ago, which the intestate was to pay for on the marriage of the plaintiff, which did not happen till lately, and two years after the death of the intestate. It was objected for the defendant, that this special contract could not be given in evidence under this declaration. Lord LOUGHBOROUGH overruled the objection, with leave to move for a new trial; and assets being proved, there was a verdict for the plaintiff for the value of the cattle.

Graham moved for a new trial. *Partridge* showed cause.

The Court said, as there was no plea of non-assumpsit, the plaintiff must, at all events, have had a verdict on the *plene administravit*, with nominal damages; and now, on a motion for a new trial, whether the special contract might or might not be given in evidence, they would look at the merits; and as no injustice had been done, the rule must be discharged.

Rule discharged.

*BINGLY v. MALLISON. May 11.

[*402]

On a new trial, a fresh notice of trial is necessary.

New trial from the northern circuit. The point determined was, that, on a new trial, a fresh notice of trial is necessary. For want of such notice in this case, a second new trial was granted.

MEYER v. GREGSON.¹ May 11.

Policy of insurance "at and from Jamaica to Liverpool, warranted to sail on or before the 1st of August," the vessel not sailing before the 1st August, held that the risk was not divisible, and that the assured was not entitled to a return of any part of the premium.

THIS was an action for a return of premium, tried before WILLES, J., on the northern circuit. The policy was "at and from Jamaica to Liverpool, warranted to sail on or before the 1st of August, premium twenty guineas per

¹ S. C. Park Ins. 527, 6th ed.

cent., to return eight if the vessel sailed with convoy." The vessel did not sail till September and was lost. The defendant paid eight guineas into court, and the jury apportioned the premium, and gave eight guineas more, allowing four guineas for the risk which the underwriters had run at Jamaica. The defendant moved for a new trial, on the ground that the risk was not divisible.

Lee and *Wood* showed cause, and endeavored to distinguish this case from *Lorraine v. Thomlinson*, B. R., H. 21 Geo. 3, ante, vol. ii. p. 583; *Tyrie v. Fletcher*, B. R., E. 17 Geo. 3, Cowp. 666; and *Birman v. Woodbridge*, B. R., T. 21 G. 3, ante, vol. ii. p. 781. If in any case there can be an apportionment, it is in a case like the present, where no part of the voyage has been risked, and where the value of the risk at Jamaica is well known.

Sir T. Davenport and *Wilson*, contra.

LORD MANSFIELD.—It would be endless to go into inquiries about the risk at Jamaica; it appears on this evidence to have been different on different sides of the island. In *Stevenson v. Snow*, the Court went on its being expressed by the parties to be two voyages; the usage, which they all [*403] *knew, being to have convoy only from Portsmouth, and the risk from London to Portsmouth being exactly known. Unless it be an absolute void contract, the premium is not to be returned. It is sufficient that the risk began.

WILLES, Justice.—I think the risk ought to be apportioned.

ASHURST, Justice, agreed in opinion with **LORD MANSFIELD**.

BULLER, Justice.—The parties have not considered it as two risks, nor estimated the risk at Jamaica. The Court cannot do it for them. In all the insurances from Jamaica, the insurance is at and from. In many instances, the voyage has not begun, and yet there never was an idea of the premium being returned.

Rule absolute.¹

¹ Vide *Long v. Allen*, B. R., E. 25 Geo. 3, post, vol. iv. and the notes there. See also the observations of Mr. Justice PARK on this case. *Insurance*, p. 527, *et. seq.* 6th edition.

The following cases on this subject, which have occurred in the American courts, are given from Mr. Phillip's excellent "Treatise on the Law of Insurance. Boston, 1823," p. 509.

"An open policy was made on the cargo of a vessel until her return to the United States, as interest might appear at a rate of premium of 15 per cent. for six months. It appeared that there was a cargo on board, at different times, of the value of 5000 dollars, 1800 dollars, and 2500 dollars. It was held in the Circuit Court of the United States, that the premium must be estimated on the amount of risk, and for the time during which it was at risk, though for less than six months, and this was said to be according to the general usage. *Pollock v. Donaldson*, 8 Dall. 570.

"In a case which occurred in Pennsylvania on a policy upon a cargo from the United States to Havana and back, it was stipulated in the policy, that 'if bills were remitted back for the whole or a part of the sum insured, a return of seven and a part per cent. on the amount so remitted' should be made. Nothing was either remitted or shipped homeward. Chief Justice TILGHMAN said, 'Where the voyage is entire, and the risk has once commenced, there shall be no return of premium. But where, by the course of trade, or the agreement of the parties, the voyage is divided into distinct parts, and on one of the parts no risk has been run, there shall be an apportionment of the premium. A voyage may be entire, though a ship is to go to different places, and take in a number of different cargoes. But if, in the contract, there are certain contingences introduced, which at certain periods of the voyage may operate to make the insurance void, it is considered that the voyage may be supposed to have been divided, in the contemplation of the parties, into distinct [*404] *parts,' for which he refers to the opinion held by Lord MANSFIELD in the above case of *Stevenson v. Snow*. And it was held by the Court, that the stipulation for the return of seven and a half per cent. was a division of the risk in this policy; and that the assured was entitled to a return of that amount. Mr. Justice YATES dissented from this opinion. *Donath v. Ins. Co. of N. A.* 4 Dall. 468.

"In New York, the Court seem to have been of opinion, that where the risk is at

and from a place, and attaches at such a place, there can be no return of any part of the premium, though the risk from the place should never be run by the insurers. The Court say, 'The difficulty of apportioning the risk is insurmountable. It is impossible to ascertain the degree of risk, without travelling out of the contract, or how much of the premium shall be apportioned to each different part.' *Col. Ins. Co. v. Lynch*, 11 Johns. 289. The question of usage was not considered.

"It has been held in Massachusetts, that a usage of the particular place where the policy is made will not be a ground to claim an apportionment and return of premium. A policy was made on a cargo for a voyage from Boston to Archangel and back to Boston, and the insurers were to take the risk on shore as well as on board. The property insured outward was valued at 4600 dollars. The cargo arrived safe, but on account of the state of the markets was not sold, and the vessel returned without any property on board belonging to the assured. It was proved to be the invariable practice of all the insurance offices in Boston, public and private, to return a portion of the premium on such policies when the vessel returned without any cargo belonging to the assured, and that one-half of the premium, except one per cent., or one-half per cent., on the amount insured, was returned, unless the risk was greater on the outward than on the homeward voyage, in which case the sum returned was in the proportion of the part of the risk not run. It was known at the several insurance offices that, notwithstanding this usage, there had been sundry decisions of the Court, establishing the right to the underwriters to the whole premium. It was also the usage to return a part of the premium on a vessel insured outward and homeward that, on arriving at the foreign port of destination, sailed on another voyage. A president of one of the insurance companies said, that, in regard to the premium, he considered a policy out and home to be the same as two distinct policies. It was urged in behalf of the assured, that the distinct valuation of the outward cargo, as well as the usage above stated, made this a case of two distinct risks. On the other hand, it was argued for the insurers, that the evidence of usage ought not to have been admitted, as it went to control an established principle of law; and that if proof of usage were admitted, it should be, of the usage of Massachusetts, not of one town, as of Boston. The Court said, 'The law applicable to this case is plain, well settled, and generally understood. Evidence of usage is useful in many cases to explain the intention of the parties to a contract. But the usage of *no class of citizens can be sustained in opposition to principles of law.' *Homer* [*405] *v. Dorr*, 10 Mass. R. 26.

"The same usage has, however, continued since this decision. The general practice upon this usage shows that there is not any great difficulty in applying the principle of apportionment. One part of what I understood to be the usage is not stated in the above case, namely, when a loss of whatever kind or amount is claimed and paid, it is not customary to apportion the premium and return a part of it."

The *KING v. WETHERELL and STEED*. May 17.

(Reported, CALDWELL, 432.)

FAIRCLAIM v. THRUSTOUT.¹ May 17.

The Court will stay proceedings in a second ejectment until the costs of a former ejectment are paid though the demises are different, if it does not appear that the title is different.

RULE to show cause why proceedings in this ejectment should not be stayed till the costs of a former ejectment were paid. *Dayrell* showed cause, and stated that this appeared to be a different title, the former ejectment having been on the demise of one person, and this on the demise of him and two others jointly, and cited *Moon* on the demise of *Newman v. James*, T. 33 & 34 G. 3, where a rule of this sort was discharged, it appearing not to be on the same demise.

¹ S. C. cited 1 Tidd's Pr. 583, 8th ed.

Corper, contra.

The Court said it was not sufficient that the demise was different, the title must be different. Here it might or might not, for the new lessors might be trustees.

They gave Mr. *Dayrell* time to get an affidavit that the title was different.¹

¹ See *Doe v. Law*, B. R., H. 25 G. 8, post, vol. iv., and the note there.

[*406] *EDMUNDS and Others, who survived ELIZABETH KENT, Widow, deceased, *v.* COX and Others.¹ May 18.

Where several jointly claim a sum of money, and the cause of action is referred, and one of the parties so jointly claiming dies, the arbitrator cannot award the sum to be paid to the survivors and executors of the deceased.

DEBT by the plaintiffs, who survived Elizabeth Kent, widow, on a bond given by the defendants to them and the said Elizabeth Kent. Plea cravingoyer of the bond and condition, which latter was that if the defendants, and every of them, their and every of their heirs, executors, and administrators, for their and every of their parts and behalves, did in all things well and truly stand to, abide by, &c., the award, &c., of W. W., J. P., and T. K., or any two of them, arbitrators, indifferently named, &c., to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action, suits, indictments, prosecutions, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or any of them, so as the said award be made in writing, &c., on or before the 5th day of November next ensuing, &c., then the obligation to be void. The plea then proceeded as follows:—The said defendants say that the said plaintiffs ought not, &c., because they say that the said W. W., J. P., and T. K., the arbitrators in the said condition above mentioned, did not, nor did any two of them, make any award between the said defendants, and the said Elizabeth, and the said plaintiffs, in the said condition mentioned, according to the form and effect of the said condition, &c., and this, &c. Replication: that after making of the writing obligatory, and before the 5th of November, the said Elizabeth Kent died, having made her will, and appointed M. K. and W. E. executors, who proved the same; that the arbitrators named in the condition took upon themselves the burden of the award, and heard the allegations, &c., of the said plaintiffs, of the said M. K. and W. E., executors, &c., and of the said

[*407] *defendants; but the said W. W. refusing to join with the said J. P. and T. K. in making the award, the said J. P. and T. K. did then and there make and publish their award [setting out the award, amongst other things ordered that the defendants should pay the plaintiffs, and to M. K. and W. E., the sum of £70, in full discharge of all moneys, &c., due to Elizabeth Kent and the plaintiffs, and that all actions, &c., commenced between the said E. Kent and the plaintiffs and the defendants should cease]. Demurrer, assigning for cause that the award ought to have been made between the said defendants and the said Elizabeth Kent and the said plaintiffs, and that the replication was no answer to the plea, inasmuch as the award was made after the death of the said Elizabeth Kent, and for that the power of

¹ S. C. 2 Chitty's Rep. 432.

the arbitrators to make any award of and concerning the premises ceased upon the death of the said Elizabeth Kent. Joinder in demurrer.

Morgan, for the defendants.—The objection is that the power of the arbitrators determined by the death of Elizabeth Kent. In *White v. Gifford*, B. R., E. 13 Car. 1, 1 Roll. Ab. 331, it was held that the marriage of a woman who had submitted to arbitration was a revocation of the authority. At common law, the death of a party before judgment abated the suit; and here by the death of Elizabeth Kent the authority was revoked. The bond is not single, but to perform an award; and there being no award, there is no breach of condition.

Bower, contra.—There are no objections to the merits of this award, supposing that it could be made between these parties. The objection is, that the power of the arbitrators was determined by the death of one of the persons named in the submission bond. Nothing is said in the bond that the award shall be made between the parties, so as to give room to object on account of the wording of the bond. The spirit of the submission is therefore to be considered. What that is appears from the clause by which the executors of the defendants are bound to the executors of the plaintiffs for performance of the award. That executors are entitled to the benefit of an award appears from the case of *Dawney v. Vesey*, C. B., M. 2 W. & M. 2 Vent. 249; and that they are bound appears from *Freeman v. Bernard*, B. R., T. 9 W. 3, 1 Ld. Raym. 247; 1 Salk. 69; Carth. 378, S. C. The [*408] reason given, "that the award creates a duty," applies equally to the bond.—A bond creates a duty. Here the causes of action submitted were joint; and if one of the parties died, still the causes of action survived. In the case cited from Rolle's Abridgment, a third person, viz., the husband, would have been affected. At all events, the award will only be void as to the party who has died, and good as to the survivors, for it is a joint right or title which was referred.

Morgan, in reply.—Suppose there had been but one defendant and he died—could the arbitrator have proceeded to make an award? It is true that the right survives, but then the arbitrators have done wrong, for they have awarded part to the executors.

LORD MANSFIELD.—That is decisive. The award is made for the payment of a certain sum to surviving parties, and to the executors of a deceased party, which executors are not before the Court. There must be judgment for the defendants.

The rest of the Court concurring.

Judgment for the defendants.¹

¹ See *Rhodes v. Haigh*, B. R., M. 4 G. 4, 2 B. & C. 345; 3 D. & R. 610, S. C.; *Tyler v. Jones*, B. R., T. 5 G. 4, 3 B. & C. 144; 4 D. & R. 740, S. C.; *Dowse v. Cox*, C. B., E. 6 G. 4, 3 Bingh. 20; *Clarke v. Crofts*, C. B. E. 8 G. 4, 4 Bingh. 143; *M'Dougal v. Robertson*, Exch. Ch. M. 8 G. 4, 4 Bingh. 435; *Watson on Awards*, 18.

NEATLEY v. EAGLETON. May 18.

Where a bankrupt is taken in execution after his certificate is signed, but before it is allowed, and deposits the amount of the debt with the sheriff, who thereupon releases him, the Court will not order the sheriff to return the money to the defendant.

T. COWPER showed cause against a rule calling upon the plaintiff to show cause why the sheriff of London should not return to the defendant a sum of money paid to him by the defendant under the following circumstances:

*The plaintiff having recovered a judgment against the defendant, took him in execution, after a commission of bankrupt had issued [*409]

¹ S. C. cited 2 Tidd's Pr. 1049, 8th ed.

against him, and his certificate had been signed, but not allowed. Before the allowance, the defendant, in order to procure his discharge, paid the money into the sheriff's hands. A few days afterwards the certificate was allowed, and the present rule obtained.

Courper opposed it on the ground, that the sheriff, having let the defendant out of custody, had made himself liable to the plaintiff for the whole sum, in an action of debt for the escape; and the Court was of this opinion.

Rule discharged.

The KING v. The Inhabitants of EDMONTON. May 19.

(Reported, CALDECOTT, 435.)

The KING v. The Inhabitants of SEATON and BEER. May 19.

(Reported, CALDECOTT, 440.)

The KING v. SALTREN, Esq. May 19.

(Reported, CALDECOTT, 444.)

The KING v. The Inhabitants of NORTH BEDBURN. May 19.

(Reported, CALDECOTT, 452.)

[*410] *FIELD v. LODGE.¹ May 24.

If the principal die after the return of the *ca. sa.*, and before it is filed, the bail are fixed.

THE defendant died after the *ca. sa.* was returnable, but before it was actually returned and filed. This was a motion to stay the filing, in order to prevent any proceeding against the bail.

Courper showed cause.—He said, When the writ was returnable, the bail were fixed; and the return, when filed at any subsequent time, related back to the return day.

BULLER, Justice, agreed, and cited *Elleswell v. Satchwell*, and *Hunt v. Cox*, B. R., M. 3 G. 3, 3 Burr. 1866, where DENNISON, J. considered the point as settled, and that the filing of the return was only form.

Sir T. Davenport, contra, said, the plaintiff in this case had lain by a whole term; but

The Court said, the point was settled, and discharged the rule.

Rule discharged.

¹ S. C. cited 2 Tidd's Pr. 1148, 8th ed.

WADHAM v. MARLOWE. May 24.

(Reported, 8 EAST, 814; 2 CHITTY'S Rep. 600.)

NELSON v. POWELL.

Where an agent, without declaring his principal, purchases goods, the vendor, on discovering the principal, may sue him, though he has debited the agent, and though the principal has remitted money to his agent to discharge the debt.

THIS was an action of assumpsit for goods sold and delivered, tried at Exeter before Mr. Baron HOTHAM. The facts at the trial appeared to be

these:—The defendant, by one Thomas his broker, bought goods of the plaintiff. The invoices were made out in the broker's name for goods delivered to him, and were all paid for except a balance, for *which the plaintiff pressed Thomas, who had not declared his principal. One [*411] of the plaintiff's letters to Thomas was sent by him to the defendant, who, having remitted to Thomas sufficient to pay the plaintiff, wrote to the latter and informed him of that fact. After this the plaintiff again called on Thomas to pay the money as due from him; but this not being done, the plaintiff brought the present action. The jury having found a verdict for the plaintiff,

Lawrence now moved for a new trial, on the ground that the credit had been given to Thomas, and that he alone was liable; but

Lord MANSFIELD held the principal liable whenever he was known, and 'The rule was refused.'

¹This case is shortly stated by Lord ELLENBOROUGH, in *Patterson v. Gandasequi*, B. R., H., 52 G. 3, 15 East, 65. The statement there given is not altogether correct. It is said, "There a factor made purchases for his principal who made payments to him on account;" but, in fact, the payments on account were made by the factor Thomas to the plaintiff. This mistake gave rise to another. "The attorney-general said he believed the case went further, and that the principal there was held liable to the whole amount of the purchases. *Le Blanc*, J.—I should think not; the case can hardly be supported to that extent." In fact the plaintiff only sought to recover the balance.

A case somewhat similar to the above was tried before *Eyre*, C. B., at the Winton Summer Assizes, 1798; when a verdict was found for the plaintiff; and on a motion for a new trial, which came on in Hilary Term, 1799, the Court discharged the rule. Lord KENYON, on that occasion, said to the other judges, that when there was no profit to be made by way of an intermediate contract, if the principal did not furnish his agent with ready money, he would be liable, though he might afterwards supply him with cash to pay the persons with whom he immediately contracted, for he would, in such case, be making contracts for his principal. But if a man should agree with another to execute a contract for him, not as his servant, but as a contractor with him, upon which he was to gain a profit, then the principal would not be liable in case of nonpayment by the person with whom he contracted. In this case, the defendant *Charretier* was a contractor to supply the French cartels at Portsmouth with provisions, and employed one *Smith* to procure what he wanted, which *Smith* did in his own name, and was debited by the different tradesmen. The defendant had remitted money to *Smith* to pay them, which he did not do but absconded. As there was evidence that the defendant had gone himself to some of the tradesmen, and had personally undertaken, it was not necessary to state the law on the *general question to the bar. *Robson v. Charretier*, B. R., H. 39 G. 3. [*412]

The law as to the responsibility of principals has been much considered in several modern cases. *Patterson v. Gandasequi*, B. R., H. 52 Geo. 3, 15 East, 62; *Addison v. Gandasequi*, C. B., T. 52 G. 3, 4 Taunt. 574; *Waring v. Favench*, cor. *Ld. ELLENB.* 1807, 1 Camb. 85; *Seymour v. Pyciau*, B. R., M. 58 G. 3, 1 B. & A. 14; *Thomson v. Davenport*, B. R., H. 9 & 10 Geo. 4, 9 B. & C. 78. The result of these cases, as stated in the last, is this. If a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may, in the mean time, have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification,—that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding that knowledge chooses to make the agent his debtor, dealing with him alone, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election, when he had the power of choosing between the one and the other. The mere knowledge that there is a principal, his name not being disclosed, will not prevent the seller from resorting to him, after having debited the agent.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

IN THE TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

COOPER v. WATSON. June 15.

By articles of partnership, it was covenanted that the trade (of a brewer) should continue for eleven years, with a proviso, that if either of the parties should be so minded, on giving six months' notice to the other he should be at liberty to quit the trade and mystery of a brewer, and the other party should be at liberty to continue the trade on his own account. Held that the party giving notice could not carry on the trade on his own account.

THIS was an action of covenant on articles of copartnership. The declaration stated that by the articles of copartnership it was covenanted that the copartnership, which was in the trade of a brewer, should continue for the term of eleven years, if the parties should so long live, with a proviso that, if either of the parties should be so minded, on giving six months notice to the other he should be at liberty to quit the trade and mystery of a brewer, and that the party, to whom such notice should be given, might be at liberty to continue the trade on his own account. The declaration then assigned as a breach, that the defendant had carried on the trade on his own account. The defendant pleaded, that he gave six months' notice to the plaintiff, to which plea the plaintiff demurred.

Bower for the demurrer.—The partnership was to subsist for eleven years, or until either of the parties should desire to quit the trade. This being a very expensive trade, if either party could determine the copartnership without quitting the trade, an opulent partner might, by continuing the trade [414] separately on his own account, ruin the other. *The true construction of the covenant is, that the party giving notice shall not continue the trade, as appears from the words "be at liberty to quit the trade and mystery of a brewer."

Wood, contra, endeavored to show that the meaning of the proviso was merely that the party giving notice should quit the trade and mystery as carried on in partnership.

Lord MANSFIELD told *Bower* that he need not trouble himself to reply. He said that the meaning of the parties was very plain; it was that the assistance in the trade should not be given to any other than the plaintiff.

BULLER, Justice.—The words are most clear; "quitting the trade or mystery" means that he must quit the trade altogether.

Judgment for the plaintiff.

PHILIPS v. HARDINGE.¹ June 15.

The Court will not grant a rule for an imparlance; the defendant may take it without leave.

BALDWIN moved for a rule to show cause why the defendant should not have an imparlance. The last day for delivering declarations this term was Saturday, and this declaration was delivered on Sunday.

Lord MANSFIELD.—The Court never grant such a motion. If you are entitled to an imparlance, you may take it without leave. Motion denied.

¹ S. C. cited 1 Tidd's Pr. 473, 8th ed.

The KING v. JAMES. June 16.

(Reported, CALDECOOT, 458.)

*HASLINGTON and Another v. GILL and Another.¹ June 18. [415]

By settlement before marriage, thirty-two cows, &c., and the increase and produce arising therefrom, the property of the woman, are assigned to trustees for her separate use, the husband covenanting to permit her to carry on the trade of a cowkeeper for her sole use. After the marriage, the wife, with the profits of her trade, purchases four more cows. Held that the settlement was good against the creditors of the husband, and that the cows purchased after the marriage, are also protected by it.

THIS was an action of trover against the sheriff of Middlesex for eight cows and a heifer. It was tried at Guildhall, before BULLER, Justice, at the sittings after last term, when a verdict was found for the plaintiffs, with fifty pounds damages, subject to the opinion of the Court on the following case:

By indenture tripartite, dated the 11th of October, 1779, between John Rhodes of the one part, Anne Peach, widow, of the second part, and the plaintiffs of the third part, reciting that a marriage was intended between J. Rhodes and Anne Peach, and that part of the personal estate of Anne Peach consisted of thirty-four cows and upwards, and that it was agreed between J. Rhodes and A. Peach, that thirty-two of the most valuable of the said cows, in the opinion of the said Anne, her executors and administrators, and one bull, and such other things as were therein after mentioned, should be assigned by her to the plaintiffs upon the trusts after mentioned, the said Anne Peach, in pursuance of the said agreement, and in consideration of five shillings, assigned to the said plaintiffs, their executors, administrators, and assigns, all such personal estate of her, the said Anne Peach, as consisted of thirty-two of the most valuable of her cows, in the opinion of her, &c., and the increase and produce to arise therefrom, and two of her best horses, and one bull, three featherbeds, &c., to hold to the plaintiffs for ever, on the trusts following:—To permit the said Anne Peach, or such person as she should by will appoint, and in default of appointment, her administrators, to keep and enjoy and at her and their own will to sell the said cows and premises, and the increase and produce to arise and be produced from the same, for her and their proper use; and that the said John Rhodes should not intermeddle therewith, neither should the same, nor any part thereof, be liable to his control, debts, disposition, or engagements, but be

¹ S. C. without the arguments of Counsel, 3 T. R. 620 a. (a).

[*416] wholly in the power and *disposal of the said Anne Peach. And the said John Rhodes covenanted to the plaintiffs that the said cows, &c., and the increase, benefit, and produce arising from the same, should remain and be for the purposes and trusts before expressed; and that he would permit the said Anne Peach to carry on the trade and business of a cow-keeper and milk-seller according to her own will and pleasure, and at such place and places as she should from time to time think proper, for her own sole use and benefit. The marriage was afterwards had; and the defendants in July, 1782, levied an execution at the suit of H. M'Cluish against the goods of the said John Rhodes, and seized, and after notice given to them of the said settlement sold, eight cows and one heifer, four of which were part of the cattle belonging to the said Anne Peach before her intermarriage, and mentioned in the deed of settlement, and the rest of them bought with the money produced by sale of the milk of the cows mentioned in the settlement. The said Anne Rhodes is still living.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the whole or any of the cattle. If the whole, the verdict to stand; if the four cows included in the settlement, a verdict to be entered for £25.

Wood for the plaintiffs.—The plaintiffs are entitled to recover the whole. It will be said for the defendants that the settlement was a fraud on the creditors of the husband. There is, however, no fraud stated; and if there was any, it must be a constructive fraud on the statute of Elizabeth. But the marriage was a good consideration for the settlement, and it can make no difference whether the stock was live or dead. It is a common practice to settle money or furniture upon trustees for the separate use of the wife, and even part of the husband's property may be so settled. Nor was it ever considered fraudulent that the wife, living with her husband, should have such property for her separate use. It cannot be a fraud upon the creditors of the husband, for the subject of the settlement never was his property. In Lord Montfort's case, *Cadogan v. Rennell*, B. R., E. 16 Geo. 3, Cowp. 432, a settlement of this kind was held good even against a person who was a creditor at the time of the settlement made, and though it was the husband's property that was settled.

[*417] **Baldwin*, contra.—The argument on the other side has not touched the case of the property purchased since the intermarriage.

[*Wood*.—The accessory must follow the principal.] These are not usual settlements amongst people in trade, and this case, therefore, is not governed by *Cadogan v. Kennett*. If the subject-matter of the settlement consisted of stock in the funds, it would stand in the name of the trustees, and creditors would not be misled. But here the husband is in the visible possession of the cows, and maintains them, at least it is not stated otherwise in the case, and it is the visible possession which misleads the creditor. As to the latter part of the case, the plaintiffs have no pretence of title to the cows purchased since the marriage. Though the thirty-two cows were vested in the trustees, the produce of them becomes the property of the wife, and as soon as she receives it the trust is at an end.

Wood in reply.—It does not appear that the husband ever interfered in the wife's business. In fact he was a stone-mason. In case any of the cows died, the loss must be supplied, or the purposes of the settlement would be defeated. How could the loss be supplied, unless by the purchase of new cows from the produce?

Lord MANSFIELD.—By the common law the wife can have no separate property; but in equity women have for ages been protected from the extravagance of their husbands in fair and proper cases. This has been accom-

plished by the intervention of trustees, and as to the property settled in them the wife is considered a single woman. A court of law must recognise the legal estate in the trustees, otherwise the whole system would be overturned. Fraud indeed vitiates everything; but here there are no circumstances of fraud, either at the time of the making of the settlement, or in the subsequent carrying on of the trade for the benefit of the wife. There might indeed have been circumstances evidencing the fraud, as if the husband had himself carried on the trade, and kept the cows, and in so doing had contracted debts.¹ But here the naked question is, whether or not the husband could enable his wife to carry on a separate trade. As to the other question, I cannot distinguish between the four cows subsequently purchased and the rest.

*WILLES, Justice, of the same opinion.

ASHURST, Justice.—Possession alone is not evidence of fraud, and [*418] does not mislead, as in the common case of a furnished lodging. If any property can be settled, this may, and the trustees have by the deed the legal property in the increase and produce. If the wife has disposed of the produce, it is as their agent.

BULLER, Justice.—Possession alone is not fraud, unless the possession be inconsistent with the deed. The trustees and the wife are one person, and a purchase by her is the same as a purchase by them, unless she went beyond the produce.

Postea to the plaintiffs.²

¹ See this point settled in *Jarman v. Woollston*, B. R., E. 80 G. 8, 8 T. R. 618.

² See *Edwards v. Harben*, B. R., T. 28 G. 8, 2 T. R. 587; *Steel v. Brown*, C. B., M. 49 G. 8, 1 Taunt. 881; *Dawson v. Wood*, C. B., M. 51 G. 3, 3 Taunt. 256; *Benton v. Thornhill*, C. B., M. 57 G. 8, 7 Taunt. 149; *Kidd v. Rawlinson*, C. B., 40 G. 8, 2 B. & P. 59; *Steward v. Lombe*, C. B., H. 60 G. 8, 1 B. & B. 506; *Wordall v. Smith*, 1 Camp. 382.

The mere fact that there has been no change of possession is not conclusive evidence of fraud. *Hoffman v. Pitt*, 5 Esp. N. P. C. 25; *Eastwood v. Brown*, Ry. & Moo., N. P. C. 812. So, if goods seized under an execution are *bona fide* sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions, if the circumstances under which he has possession are known in the neighborhood. *Latimer v. Batson*, B. R., M. 6 Geo. 4, 4 B. & C. 652; 7 D. & R. 106.

TOTTY v. NESBITT. June 18.

(Reported, 3 T. R. 153) (n).

GREGORY v. CHRISTIE.¹ June 19.

[*419]

Policy "on goods, specie, and effects," at and from London to Madras and China, with liberty to touch, stay, and trade at any ports, &c., until the vessel shall arrive at her last loading port in the East Indies or China. Held that, by the usage of the East India or China trade, this policy covers an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China.

The words "goods, specie, and effects," by the usage of trade, cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges respondentia interest.

THIS was an action on a policy of insurance upon "goods, specie, and effects at and from London to Madras and China, with liberty to touch, stay, and trade at any ports or places whatsoever, until the vessel should be

¹ S. C. Park. Ins. 14, 66, 6th ed., but without the arguments of counsel.

arrived at her last loading port in the East Indies or China." On the trial it appeared that the plaintiff was the captain of the vessel, and claimed under the insurance £3000, advanced by him for stores in the course of the voyage, and for which he charged respondentia interest. Two questions were made, First, whether an intermediate voyage from Madras to Bengal was or was not within the terms of the policy. Secondly, whether the captain's interest as to the £3000 was covered by the words of the policy, "goods, specie, and effects." A verdict having been found for the plaintiff, and a rule for a new trial obtained on the above points.

Erskine showed cause.—This is not the case of a private ship. All the ships in the East India trade sail under one universal charter-party, and the presidencies of the several governments have a right to call on ships to make such intermediate voyages. In this case the ship arrived too late to go on to China in consequence of the monsoons, and therefore the intermediate voyage was not an abandonment of the voyage to China. It was highly reasonable that when the ship was too late to pursue her voyage to China, the Company should make use of her until the period for accomplishing that voyage returned. Further, it was the meaning of the parties, and was always understood, that intermediate voyages should be covered.

Bearcroft, contra.—With regard to the first question, the understanding of the parties is to be collected from the words used in the policy; but if any doubt remains it may be explained by custom and usage. Until the year 1781, the mode of insuring intermediate voyages was by an insurance of an [*420] entire voyage out and home, whereby they were *insured of course. At that time the words "at and from, and to any ports and places whatsoever and wheresoever, forward and backward," always covered the intermediate voyage, but after the year 1781 voyages were broken into parts, and it became usual to insure outward bound voyages and homeward bound voyages separately. It has been said that there are words in this policy which will apply to intermediate voyages, viz. "with leave to touch, stay, and trade at any ports or places whatsoever." The word *trade*, however, gives a liberty of trading *only in the course of the voyage*, and if the parties meant to insure the intermediate voyage, why did they not make use of the common form of words? There are well-known forms of expression which include intermediate voyages, as "in port or at sea, and also in all places and at all times until her arrival at," &c., which are clearly more extensive than backwards and forwards. When the parties abandon the old form of words, and do not use others tantamount, it is plain they did not mean to cover intermediate voyages. With regard to the second question, the captain having disbursed money for the use of the ship, for which he had charged respondentia interest, it would not come under the words in the policy "specie or effects." It was a respondentia or bottomry interest, though not by bond, or at all events in the nature of a respondentia or bottomry interest, and ought to have been insured as such.

Lord MANSFIELD.—I have no doubt in this matter. To understand a policy you must refer to the course of the trade to which the policy relates. According to the course of trade here, if a ship sailing from England to Madras and China arrives at Madras too late to go on to China that season, the Company employ her in intermediate voyages. Until the year 1781 it was usual to insure the whole voyage by general words; but now the outward and homeward voyages are separated. This is a policy on an outward bound voyage, and in the liberty which it gives to trade, as well as to touch and stay, it differs from the usual form of policies. Now if this be confined to trading in the course of the voyage, the intermediate voyages are omitted; but on the face of the policy, independent of the usage, I think the word *trade* comprehends the intermediate voyage, and this construction is con-

firmed by the usage of the trade. As to the second question, there is a usage known to the parties, under which *they contract. This kind of interest has been usually covered by this form of insurance. On [*421] that ground I think the insurance ought be held sufficient.

ASHURST, Justice.—The war was the cause of dividing the policy, for if there were only one voyage, there must have been a much larger premium, which a peace might render unnecessary.

BULLER, Justice, cited *Glover v. Black*, B. R., T. 3 G. 3 Burr. 1394, as an authority upon both points. Rule discharged.¹

¹ See *Farquharson v. Hunter*, B. R., H. 25 G. 3, 1 Marsh. Ins. 274; *Lavatre v. Wilson*, B. R., M. 20 G. 3. ante, vol. i. p. 284. See also *Preston v. Greenwood*, M. 25 G. 3, post, vol. iv.

JANSON v. THOMAS.¹ June 19.

A bill of exchange, payable *at sight*, is not a bill payable *on demand*, within the exception in 22 Geo. 3, c. 49. *Quære*, Whether days of grace are allowed on bills payable at sight.

THIS was an action upon two bills of exchange payable at sight. At the trial it was objected for the defendant that the bills ought to have been stamped; to which it was answered, that the statute 22 Geo. 3. c. 33, the stamp act then in force, excepted bills payable on demand, and that these bills came within the operation of that act. The learned Judge before whom the cause was tried not being of that opinion, the plaintiff was nonsuited. A rule having been obtained for a new trial, on the ground that the bills did not require a stamp,

Erskine and *Mingay* showed cause, and contended that there was a distinction between bills payable at sight and on demand; that the former were entitled to three day's grace, while the latter were not. They said that the object of the legislature was to except drafts on bankers.

Bearcroft, contra.—The principle on which the legislature proceeded was, that where time is got by bills, it will bear a tax, and not otherwise. The words of the act are, *payable on demand*. A bill at sight is payable on demand. It is not clear that bills at sight are entitled to days of grace. A distinction exists between foreign and inland bills. On such foreign bills days of grace may be allowed, but *not on such inland bills. No [*422] case is to be found on the subject.

LORD MANSFIELD.—The act of 22 Geo. 3 lays the duty generally on all bills, with certain exceptions, amongst which bills at sight are not to be found. I believe there is great doubt as to the usage about the three day's grace. I do not like to go upon that ground, but the words of the act are "on demand," and I think that we cannot make a further exception by implication.

ASHURST, Justice.—I am of the same opinion. We had better go upon the words of the act than make a precedent which may affect trade.

BULLER, Justice.—I think *payable on demand* is the same as *drawn payable on demand*. The other point is doubtful, but it is not new; for in a case before WILLES, C. J., in 16 Geo. 2, a special jury certified that, on bills at sight, three days were allowed. That was an action on an inland bill. I know that now they differ about it in the city, but in general it is taken.²

Rule discharged.

¹ S. C., cited Bayley on Bills, 79, 4th ed.

² According to Beawes, pl. 256, and Kidd (on Bills, 10), no days of grace are allowed on bills payable at sight; but other authorities differ. *Dehors v. Harriott*, B. R., T. 2 W. & M. 1 Show, 164; *Coleman v. Sayer*, B. R. Barnardiston, 308; Bayley on Bills, 198, 4th ed.

BENTLEY v. COOKE.¹ June 22.

In an action by a woman suing as a feme sole, her husband is an incompetent witness for the defendant to prove her marriage.

THIS was an action of assumpsit by a woman suing as a feme sole tried before BULLER, J. After the plaintiff had proved her case, the defendant called one James Ramsden, who proved that he was married to the plaintiff, and produced a copy of the marriage register. On his cross examination, he stated, that he and his wife had been long separated by agreement without deed, and that the plaintiff maintained herself, and allowed him a certain sum yearly. The plaintiff having been nonsuited on the ground of the coverture, a rule for a new trial was obtained on the incompetency of the husband as a witness.

[*423] *Lee and Peckham showed cause. The husband was competent. He was, in fact, speaking against his own interest, for whatever his wife recovered in that action would become his property. It is said, however, that a husband or wife cannot be a witness for or against each other; but the true reason why the wife is incompetent is that she is supposed to be under restraint. The objection, in this case, cannot be stated, without being answered, "You reject the witness because he is the plaintiff's husband. If he is the plaintiff's husband she cannot maintain the action." The husband was only called to prove the copy of the register, which any person may prove, and the Court will not, under such circumstances, put the plaintiff to the expense of a new trial.

Bearcroft, contra.—The general rule founded on principles of domestic policy is that husband and wife shall not be permitted to give evidence either for or against one another. Cases of violence, as Lord Audley's case and some other cases, are exceptions to this general rule, on the ground of necessity, but there is nothing here to bring the case within the exception. In *Broughton v. Harper*, Coram Holt, 2 Lord Raym. 752, it was ruled, that if a man marries a second time, before his first wife dies, his first wife cannot be called to prove her marriage to him. So in prosecutions for bigamy the first wife is not a competent witness to establish the first marriage. *Mary Grigg's case*, B. R., M. 12 Car. 2, Sir T. Raym. 1. But, independently of considerations of policy, the husband here is interested. He swears to entitle himself to the action and to the money. It is said that the objection cannot be stated without being answered, for that the objection supposes to be true the fact which the witness is called to prove. But that answer is a fallacy, and would tend to defeat almost every objection on the ground of interest. [BULLER, J.—Supposing the plaintiff to have recovered, would the husband have been entitled to bring another action? Lord MANSFIELD.—I think not: the husband suffers his wife to live apart, and to carry on trade. The defendant knows nothing of the husband.]

Lord MANSFIELD.—There never has been an instance either in a civil or criminal case where the husband or wife has been permitted to be a witness [*424] for or against the other, *except in case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury. I think the husband was not a competent witness:

WILLES and ASHURST, Justices, of the same opinion.

¹ S. C., cited 2 T. R. 265, 269.

BULLER, Justice.—If this case is to be determined by the abstract general rule that husband and wife cannot be witnesses for or against each other, the witness was certainly incompetent. But if that rule be grounded on the principle of interest, then I think the husband was a competent witness. How is the husband's interest affected here? He is interested to disprove the marriage, because he is liable to maintain his wife. He is interested to disprove the marriage on this occasion, because, if the wife should recover, all that she recovers will be his. In proving the marriage, therefore, he is speaking against his own interest. I cannot think that the verdict in this action would be a bar to another action by the husband for the same cause. Suppose that a wife gets possession of her husband's effects, and sells them, shall she recover the price and her husband be barred? I think the true ground in these cases is laid down in *Abraham v. Bunn*, B. R. 4 Burr, 2251, that the interest to exclude must be an interest in the question. As to the general rule, I find it only in criminal cases, and then where the marriage is admitted. Where the marriage is in question, as here, every motive of interest is certainly the other way, because the husband may hurt himself, but cannot do himself any good. However, if the rule is a general one, to be sure it must prevail.¹

Rule absolute.

¹ In *The King v. Inhabitants of Cleverger*, B. R., H. 28 G. 3, 2 T. R. 269, GROSZ, J., said, referring to the present case, "Mr. Justice BULLER doubted at first, because he thought there was no interest in the party whose testimony had been admitted, but on further consideration of the subject, I know that he gave in to the opinion of the other Judges upon the general principle which governed them, and he thought the rule a very proper one, as it tended to prevent dissensions amongst families."

*PHILPOTTS *en dem.* PHILPOTTS v. JAMES and Others. [*425]
June 22.

Lease *pur autre vie*, to T. P. and his heirs, of a rectory, tithes and premises. T. P. died, living *cestui que vie*, and by his will devised the premises to M. H. J., his heir-at-law (without saying "his heirs") with a direction to renew the lease. M. H. J. died, devising the premises by a will, attested by two witnesses. Held that the heir-at-law of M. H. J. was entitled to the estate *pur autre vie*.

THIS ejectment was tried at the last Hereford assizes, and a case reserved which stated that, by indenture of 30th October, 1746, between T. Payne, archdeacon of Brecon, and landlord of the rectory of Llandew, and Thomas James, eldest son and heir of Meredith James, reciting a former lease from T. Payne to Meredith James, the said Thomas Payne, in consideration of the surrender of the said lease and of £30, did demise, grant, and to farm let, unto the said Thomas James all that the aforesaid rectory of Llandew, and all and singular the tithes and premises aforesaid with the appurtenants, in as large and ample a manner as any former tenant formerly held and enjoyed the said premises. To hold to the said Thomas James, his heirs and assigns, from the making thereof, for and during the natural lives of the said Thomas James, W. Morgan, and Charles Evans, at a rent of £10.

The premises demised by the said lease, and in question in this cause, consist of the churchyard of Llandew, about twelve acres of glebe, and all the great and small tithes of the said rectory. W. Morgan, one of the lives mentioned in the lease, is still living.

Thomas James died in 1769, having made his will, duly executed, whereby, after devising the bulk of his estate to his nephew, Meredith Herbert James, who was his heir-at-law in strict settlement, and a part of it to him in fee, he devised as follows: "Also I give to my said nephew, Meredith, all and

singular my freehold lease of the rectory and tithes of Llandew, granted to me by T. Payne, late archdeacon of Brecon, for the term of three lives, who are all now living, whereof my own life is one; and it is my will and desire, and I do hereby recommend it to my said nephew, Meredith, that after my decease he will renew the said lease, and put in his own or some younger life therein in my room," &c.

He also devised to his nephew, Meredith, the residue of his estate, real and personal, and made him his executor.

[*426] *Meredith H. James having proved the will, and being in possession of the said freehold lease, married Jane Wilkins, and afterwards died without issue in Barbadoes, having first made his will, dated May, 1774, attested by two witnesses only; whereby, after payment of debts and funeral expenses, he gave all the rest of his estate, real and personal, in Great Britain and Barbadoes, to his beloved wife, Jane James (the present defendant), to her and her heirs for ever, and made her executrix. In December, 1777, Jane James obtained probate of the said will, Meredith H. James left his two sisters, Rebecca and Anna James, his coheirs at law. Rebecca intermarried with T. Philpotts, and is since dead, leaving the lessor of the plaintiff her eldest son and heir at law. Anne James intermarried with Charles Collins, and is now living, and the said T. J. Philpotts, the lessor of the plaintiff, and the said Anne Collins, are also coheirs at law of the said T. James. The question for the opinion of the Court was, if the lessor of the plaintiff was entitled to recover a moiety of the said leased premises in question?

Bower, for the plaintiff. The plaintiff is clearly entitled to a moiety. Though tithes are an incorporeal hereditament, they were at common law the subject of special occupancy, 2 Roll. Ab. 151 (O); and, moreover, here an estate which is capable of general occupancy is joined with the incorporeal hereditaments, and then, according to *Holden v. Smallbrooke*, C. B., H. 19 & 20 Car. 2, Vaugh. 202, the grant does not determine as to the incorporeal hereditaments. It is said by FLEMMING, C. J., in *Bowles v. Poor*, B. R., M. 8 Jac. 1, 1 Buls. 137, that where a rent is granted *pur autre vie* to a man and his heirs, the heir does not take as heir by descent, but as heir *denominatim*, and as by way of limitation only, and not in any other manner; but the more correct doctrine is laid down by VAUGHAN, C. J., in *Holden v. Smallbrooke*, that "the heir has it not as special occupant (as the common expression is), for if so, such heir were an occupant, which he is not, for a special occupant must be an occupant; but he takes it as heir, not of a fee, but of a descendible freehold, and not by way of limitation as a purchase to the heir, but by descent." The circumstance mentioned by [*427] VAUGHAN, that, in case of an abatement, the *heir should recover by a writ of *mort d'ancestor* is conclusive, but see 2 Plowd. 556. So where the point was, whether the heir of a special occupant should inherit by the custom of borough English: Per HALES, C. J.—"Such heir is in by descent, and his grant over shall bind his heir. It is a freehold descendible where he shall not have age; nor will descent thereof take away entry, being an estate of inheritance, but the same as an estate tail." *Baxter v. Dowdswell*, B. R., E. 27 Car. 2, 3 Keb. 475. That such an estate *pur autre vie* is considered as real estate, where it is limited to a man and his heirs, appears from several cases. *Marwood v. Turner*, Canc. H. 1732; 3 P. Williams, 166; *Pearson v. Shore*, 1 Atk. 480.

Then, supposing this property to be the subject of special occupancy, and to be descendible to the heir, it will be clear that the plaintiff is entitled, unless some change is made by the will of Thomas James. By that will the estate is devised to Meredith James, without mention of his heirs; but as the original grant was to Thomas James and his heirs, that circumstance is im-

material, since the plaintiff is one of the heirs at law of Thomas James, the original grantee, and as such within the grant. Neither is the statute of frauds, 29 Car. 2, c. 3, nor the 14 Geo. 2, c. 20, § 9, apply to this case, as they only carry the estate to the executors, where no person is described as special occupant.

Richards, contra.—This is a question between the real and personal representatives of Meredith H. James, and the latter are entitled. Meredith H. James took nothing by descent. An estate *pur autric vie* to a man and his heirs is not properly a descendible freehold. It is not an estate of inheritance, nor has it the incidents of an estate of inheritance, as dower, courtesy, &c. Till the passing of the statute of frauds it was not assets. It is not entailable, Walsingham's case, Scacc. H. 15 Eliz., 2 Plowd. 556; nor does the descent of it toll an entry, Co. Litt. 239. That an estate of this kind may be limited to executors, shows that it cannot be an estate of inheritance, 2 Roll. Ab. 151 (R. pl. 2), recognised by Lord HARDWICKE, 3 Atk. 467. In *Elvis v. Archbishop of York*, B. R., E. 17 Jac. 1, Hob. 323, it is said *that this estate is a fictitious and not a true descendible estate, and [*428] that a grant to J. S. and his heirs is no fee but a special occupancy.

These authorities show that the heir does not take *qua* heir, and that this is something very different from an estate of inheritance.—Meredith H. James took as an occupant marked out by the grant, but not as heir; the word "heirs" is nothing more than a description, *Low v. Burron*, Canc. E. 1734, 3 P. Williams, 262; *Chaplin v. Chaplin*, Canc. T. 1735, 3 P. Williams, 368; *Williams v. Jekyl*, Canc. M. 1785, 2 Ves. Sen. 681; and on the death of Meredith H. James his executors are entitled under the statute of frauds. It is expedient that the estate should go to the executors, and be assets, as the statute has provided, and the Court will lean in favor of the personal representative.

Lord MANSFIELD.—The words of the will of T. James are general: he gives all his freehold lease. It is the same as if he had added "heirs."

WILLES, Justice.—The statute prefers the heir, and it is only where there is no special occupant that it goes to executors, and in the hands of both it is assets.

ASHURST, Justice, of the same opinion.

BULLER, Justice.—*Quacunqve via*, the plaintiff must recover. As a descendible freehold I should think the heir in by a better title. There is certainly a difference in the books as to the nature of this estate; but the opinion of VAUGHAN, which is recognised by DE GREY, C. J., in *Doe v. Martin*, C. B., E. 17 G. 3, 2 W. Black, 1150, is the better opinion. The plaintiff therefore takes as heir of a descendible freehold. If it were necessary to go farther, I agree with the rest of the Court that the estate is sufficiently given by the will. Besides the words of the devise, there follows a direction to renew, which must have been a renewal of the same estate.

Judgment for the plaintiff.¹

¹ See *Doe dem. Jeff v. Robinson*, B. R., E. 9 Geo. 4, 8 B. & C. 296.

*SYDENHAM v. RAND.¹ June 22.

[*429]

When a witness is subpoenaed to attend at the sittings, and the cause is made a *remenet*, the subpoena must be resealed and reserved, and if the witness is only served with a notice to attend at the last sittings, the Court will not grant an attachment.

BURROUGH showed cause against a rule for an attachment against a witness for not appearing according to his subpoena. The facts were that the

¹ S. C., cited 2 Tidd's Pr. 855, 8th ed.

subpoena was to appear at a former sittings, and the cause having been made a *remanet*, a notice in writing was given to the witness to attend at the sittings after last term.

Wood for the rule, contended that the witness had made no objection to the sufficiency of the notice, and that the common practice was to give such notice, to save the expense of a fresh subpoena; but the Master saying that the usual way was to seal the subpoena over again and serve it anew, the Court discharged the rule, saying the complaint was, that the witness had not obeyed the writ, whereas, in truth, he had only disobeyed the notice.

Rule discharged.

HAWKES v. SANDS.¹ June 25.

Where a trader gave orders to be denied on the 26th May, but was not in fact denied till the 28th. Held that there was no act of bankruptcy till the 28th.

MOTION to discharge the defendant on common bail, he having become bankrupt and obtained his certificate. The affidavit on which the rule was obtained stated only that the cause of action accrued before the commission issued; but on the deposition, and on the affidavits on the other side, it appeared that the note which was the cause of action was given on the 27th May; that on the 26th the defendant ordered his servant to deny him, and that on the 28th he was accordingly denied.

Bearcroft showed cause.—*Mingay*, contra.

The Court were clear that a debt accruing before the commission, but after the act of bankruptcy, was not by law proveable. But they were also clear that under the circumstances of this case the act of bankruptcy was not committed *till the 28th; (though *Bearcroft* pressed very much that the [*430] keeping house with intent to delay the creditors must have begun when the order to deny was given.)

Rule absolute.²

¹ S. C., cited Cooke's B. L. 90, 8th ed.

² But in *Lloyd v. Heathcote*, C. B., M. 1 G. 4, 2 B. & B. 888; 5 B. Moore, 129 S. C., it was held that a beginning to keep house with an intent to delay creditors is an act of bankruptcy, though no creditor is actually denied. See also *Harvey v. Ramsbottom*, B. R., M. 3 G. 4, 1 B. & C. 56; 2 D. & R. 142.

The KING v. the Inhabitants of BRADNICH. June 26.

(Reported, CALDECOTT, 461.)

ISACCS v. WINDSOR.¹ June 28.

Where the defendant is under terms to take short notice of trial for the last sittings in term, he is not bound to take short notice for the sittings after term.

THE defendant was under terms to take short notice of trial for the last sittings in Easter Term. Plaintiff gave no notice for those sittings, but gave short notice for the sittings after term, and defendant not attending, plaintiff had a verdict.

Mingay moved to set aside the verdict, on the ground that defendant, though under terms to take short notice in term, was not obliged under these terms to take short notice after term; and the Court, after consulting the Master, were of that opinion.

¹ S. C., cited 2 Tidd's Pr. 817, 8th ed.

Peckham and *Wood*, against the rule, then contended that in fact there was full notice for the sittings after term, there having been thirteen days, which was more than sufficient. But on inquiry it appeared that though there were thirteen days from the notice to the time the cause was actually tried, there was not sufficient notice to the first of the sittings, which the Court held to be necessary. Rule absolute.

*ANONYMOUS.¹ June 28. [*431]

Where a judgment by default is set aside on payment of costs, the plaintiff is to be placed in the same situation as if it had not been set aside.

GIBBS obtained a rule to set aside a judgment on payment of costs.

Sir *T. Davenport* showed cause, and consented to the rule being absolute, on giving plaintiff judgment of the term.

Gibbs contended that the Court would only put the plaintiff in the same situation as if the irregularity for which the judgment had been signed had not been committed, in which case plaintiff could only have gone to trial after term, and had his judgment next term.

But the Court said that the rule was to put him in the same situation as if the judgment had not been set aside, and as he might have executed his writ of inquiry so as to have judgment of this term, Sir Thomas's proposal was reasonable.

¹ S. C., cited 1 Tidd's Pr. 615, 8th ed.

CAWTHORNE v. THOMPSON and Another.¹ June 28.

In an action for an assault against two defendants, they agreed to consolidate the costs. One let judgment go by default, and the other pleaded. After verdict for the latter, and 1s. damages against the former, the Court allowed the costs to be set off.

ACTION for an assault. One of the defendants pleaded, and the other let judgment go by default. There was a verdict for the defendant who pleaded, and 1s. damages were assessed against the other. *Mingay* moved on an affidavit that both the defendants had agreed to consolidate the costs; that the plaintiff should only have taxed to him the costs, if any that should remain as a surplus, after deducting the costs payable to the defendant, who had got the verdict.

Bearcroft showed cause, and cited *Mordecai v. Nutting*, C. B., M. 23 G. 2, Barnes, 145.

The Court distinguished that case, as there was no agreement, as in the present, to consolidate the costs. They thought the application a reasonable one, and made the Rule absolute.

¹ S. C., cited 2 Tidd's Pr. 1029, 8th ed.

*CARMICHAEL v. CHANDLER.¹ June 29. [*432]

Where the defendant neglects to put in and perfect bail, and the plaintiff omits to declare within two terms after the return of the writ, he is not out of Court, but may take an assignment of the bail bond.

THIS was an action on a bail bond against the defendant in the original action. The declaration stated an alias bill Middlesex of T. 23 Geo. 3, re-

¹ S. C. cited 1 Tidd's Pr. 299, 8th ed.

turnable on Thursday after the morrow of All Souls, delivered to the sheriff on the 18th of July. The defendant was arrested the same day, and that the bail bond also was given the same day by the defendant and two others. Toroutbeck and Fitz, for appearance at the return of the writ. The assignment to the plaintiff was stated to have been on the 30th April. Plea that by the rule and practice of the Court, the plaintiff at and after the return of the bill of Middlesex in the declaration mentioned, might have delivered a declaration *de bene esse* against the defendant in the said Court, upon the said process; and that the plaintiff did not deliver any declaration *de bene esse* against the defendant, nor did he declare against the defendant in the said Court in any manner whatsoever; nor were any proceedings whatsoever had in the said Court upon or by virtue of the said precept, before or at the end of Hilary Term next, after the return of the said precept; nor did the plaintiff within that time in any manner whatsoever prosecute the said precept against the defendant; neither hath the defendant appeared or given bail to or upon the said precept, and that by reason thereof, and by the usage, course, and practice of the said Court, no proceedings after the end of the said Hilary Term could be had on the said precept against the defendant at the suit of the plaintiff; but upon the expiration of the same term, the plaintiff was out of Court upon the said precept, nor could he further prosecute the same. And that the said supposed assignment of the said writing obligatory in the declaration mentioned, was not made until after the end and expiration of the said Hilary Term next after the return of the said precept, and until the plaintiff was out of Court, &c., whereby the said supposed assignment was and is void in law; and this he is ready to verify. General demurrer and joinder.

[*433] *Chambre* for the defendant, contended that the plaintiff *could not take an assignment of the bail bond at a time when he was out of Court, according to the rules of the Court. He cited *Sparrow v. Naylor*, C. B., H. 13 G. 3, 2 W. Blackst. 876, and *Merryman v. Carpenter*, B. R., M. 20 G. 2, 2 Str. 1262.

Shepherd, contra.—No cause is out of Court till one of the parties is entitled to have the judgment of the Court, which the defendant here was not. The assignee of the sheriff is put in the same condition with the sheriff by the statute, 5 Anne, c. 16. No new bar was created by that statute, and it was never thought to be a bar against the sheriff, that he sued on the bail bond two terms after the return of the writ without process on it. This would enable the defendant, by his non-appearance, to defeat the very bond which was given to procure his appearance. Before the statute, 5 Geo. 2, c. 27, which enabled the plaintiff to file common bail, he had no method in any case of bringing the defendant actually before the Court. But if it were an irregularity to take an assignment of the bail bond in this stage, it is not a matter to be pleaded, but application must be made to the Court for relief. He denied the doctrine in *Sparrow v. Naylor*.

Chambre, in reply, admitted that, in the original action, the relief must be upon motion; but he contended that in this action, a plea was proper, because the proceeding was void, being founded on an irregularity.

The Court agreed that the plea was not a bar, and that the decision in *Sparrow v. Naylor* could not be supported.¹ BULLER, J., said, that the bail were not deprived of the protection of the Court, for they may come in at

¹ But where the plaintiff is completely out of Court, by not declaring in the original action within a year after the return of the writ, or in the Common Pleas, before the end of the vacation of the second term after it is returnable, it seems that the plaintiff cannot afterwards regularly take an assignment of the bail bond. 4 Taunt. 715, 1 Tidd's Pr. 299, 8th edit.

any time to say that nothing is due from the defendant. And he said that a cause is not out of Court until two terms after the defendant's appearance, see *Worley v. Lee*, B. R., M. 28 G. 3, 2 T. R. 112; *Penny v. Harvey*, B. R., H. 29 G. 3, 3 T. R. 123; *Sherson v. Hughes*, B. R., M. 33 G. 3, *5 T. R. 35; *Parsons v. King*, B. R., M. 37 G. 3, 7 T. R. 7; [*434] *Cooper v. Nias*, B. R., M. 60 G. 3, 3 B. & A. 271.

Judgment for the plaintiff.¹

¹ In a note to Mr. Wilson's report of this case, it is said, "*Quære*, If the Court did not say that the practice of the Court was never pleadable, but a subject of motion." As to this, see *Dudlow v. Watchorn*, B. R., T. 52 G. 3, 16 East, 89; *Warmesley v. Macey*, C. B., H. 1 & 2 G. 4, 5 B. Moore, 168; *Cherry v. Powell*, B. R., H. 2 G. 4, 1 D. & R. 50; *Sandon v. Proctor*, B. R., H. 8 & 9 G. 4, 7 B. & C. 800.

The KING v. COODE and Others. June 29.

(Reported, CALDECOTT, 464.)

HOOPER and Another v. LEACH and Another. June 29.

The ecclesiastical court has power to compel churchwardens to deliver in their accounts, but has no jurisdiction to examine them.

LUDERS moved for a prohibition to the Ecclesiastical Court of Exeter, in a suit instituted to litigate some particular articles in the plaintiff's accounts as church-wardens of C. The plaintiffs had been cited to exhibit their accounts in the Ecclesiastical Court, and the defendants gave in allegations, objecting to two items in the account, which were incurred by defending a suit. The plaintiffs alleged that the suit was undertaken by the directions of the parish, and that the account exhibited was a true account, and a copy of the original account entered in a parish book, with the original account, had been approved by the parishioners at a public meeting called for the purpose of settling the accounts. The defendants denied the direction and approbation of the parish, and the justice of defending the suit, and the Chancellor gave judgment against the churchwardens, who now moved for this prohibition to prevent the Ecclesiastical Court from proceeding to enforce the sentence. *Luders* cited *Wainwright v. Bagshaw*, B. R., E. 7 G. 2, 2 Str. 974; and *Adams v. Rush*, B. R., T. 13 Geo. 2, 2 Str. 1133.

Fanshawe, for the defendants, contended that the *plaintiffs came too late after sentence, unless it appears on the libel that the Court [*435] had no jurisdiction. *Full v. Hutchins*, B. R., E. 16 G. 3, Cowp. 422. It certainly had jurisdiction as to the churchwardens' accounts if not passed, and it does not appear that they have been properly passed, for the defendants deny it in their answer. There is also another objection, that whenever a prohibition is applied for on collateral matters, the suggestion must be by affidavit.

The Court admitted the general grounds taken for the defendant, but said it undoubtedly did appear on the proceedings, though not upon the libel, that the accounts had been delivered in, and then the two cases cited on the other side were decisive to show that the Ecclesiastical Court has no jurisdiction to examine these accounts, when delivered, but only to compel the churchwardens to deliver an account, see *Leman v. Goulty*, B. R., H. 29 G. 8, 3 T. R. 3.

Rule absolute.¹

¹ Burns' Eccl. Law, 412, a, Tyrwhitt's edit.

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TO

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The plaintiff's father prepared and sold a medicine called "Dr. Johnson's Yellow Ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name and mark. Held that no action could be maintained against him by the plaintiff, *Singleton v. Bolton*, 293

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A. offered to B. £20,000 of a proposed government loan, which B. agreed to take, provided he should have the £20,000 if A. was not wholly excluded. A. applied to government for £200,000, but had only £35,000 allowed him, whereupon he offered to B. £3,500. Held that B. was entitled to receive from A. the whole £20,000. *Mocatta v. Franco*, 11

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BAIL BOND.

Where the defendant neglects to put in and perfect bail, and the plaintiff omits to declare within two terms after the return of the writ, he is not out of court, but may take an assignment of the bail bond. *Carmichael v. Chandler*, 432

BANKRUPTCY.

1. Where bail apply to enter an exonoretur on the bail piece, if fraud is imputed to the bankrupt in obtaining the commission and certificate, and the trading be disputed, the Court will direct an issue to try whether the commission duly issued. *Willison v. Smith*, 96

2. Where an action is pending at the suit of a bankrupt, and the assignees arrest the defendant for the same cause of action, it is not vexatious. Assignees cannot make

themselves party to a suit, commenced by the bankrupt, before interlocutory judgment. *Barnes, assignee of Saunders, v. Maton*, 186

3. Where a bankrupt applies to be discharged out of custody on the ground that he has obtained his certificate, if the plaintiff in the action disputes the trading, the Court will direct an issue to try that fact. A scrivener is one who lends out money for others on commission. *Yee v. Allen*, 214

4. The owner of a major part of a vessel lying in port, mortgaged it and transferred the grand bill of sale to the mortgagees. The mortgagees did not take possession, but suffered the mortgagor and the other part-owners to have the management, and act as the visible owners of the vessel. The mortgagor, having become bankrupt, held that his share of the vessel passed to his assignees under the stat. 21 Jac. 1, c. 19. *Hall* and another, assignees of *Physsa*, a bankrupt, v. *Gurney*, 356

5. Where a trader at Bath left her dwelling-house and went to London for the purpose of persuading a creditor to withdraw his execution, and left word of the place to which she had gone, but failing to procure the withdrawing of the execution, did not return to her dwelling-house. Held that this was no act of bankruptcy.

A sheriff who levies, and pays over the money to one party where the goods are claimed by another, shall be presumed to be indemnified by the party to whom he pays the money, and the declarations of that party are admissible in an action against the sheriff by the other party. *Aldridge* and another, assignees of *Wall v. Ireland, Esq.*, 397

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3. Where a bill payable on demand is taken in payment for goods, it is not necessary to present it the same day on which it is received.

Semble that reasonable time is a question of law. *Appleton v. Sweetapple*, 137

4. In declaring against the endorser of a foreign bill of exchange the omission of the averment of protest is only matter of form, and cannot be taken advantage of under a general demurrer. *Solomons v. Stavely*, 293

5. A bill of exchange drawn by a bankrupt before his bankruptcy, but not endorsed to the petitioning creditor until after the act of bankruptcy, is a good petitioning creditor's debt. *Bingley v. Mallison* and another, 333

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1. A bond given to an incumbent, securing him an annuity of equal value with the profits of the benefice, upon his resignation, in order that another person may be presented, who may give a general bond of resignation, so that the patron's son, when of proper age, may be presented, is a bond within 31 Eliz. c. 6, s. 8, and void. *Young v. Jones*, 97

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2. Trespass for breaking and entering three closes in Stalmyne. Pleas in justification: 1. A right of common of turbary; 2. of pasture. Replication, that the closes are parcel of Stalmyne Moss, within the manor of Stalmyne; and there are divers ancient messuages which have had common of turbary and pasture upon the waste. The replication then stated a custom within the manor of Stalmyne for the owners of Stalmyne Moss, by themselves or their moss-reeves, to assign to the owners of such ancient messuages certain reasonable proportions of the moss-ales, to be by them held in severalty for the purpose of getting turves; and after the moss-ales shall have been cleared, the owners of the moss shall hold the same in severalty, discharged from all common of turbary and pasture. The replication then stated the clearing and improvement of the closes accordingly. Rejoinder, traversing the custom, and verdict for the plaintiff. On motion in arrest of judgment, it was objected. 1. That the custom was bad, extending to messuages without the manor. 2. That it was bad, as repugnant to the right claimed in the plea. 3. That it was bad, as not being stated to extend to all the ancient messuages. 4. That it was bad, in stating "reasonable proportions were to be assigned." Held, that the custom, as stated in the replication, was good. *Clarkson v. Woodhouse and another*, 189

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2. Rule for a mandamus to admit the prosecutor to the freedom of a corporation absolute in the first instance. *The King v. the Mayor, &c. of Coventry,* 236
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1. Where in trespass, *quare clausum fregit*, the defendant pleaded a right of way, setting out the breadth of the way, and the plaintiff new assigned, to which the defendant pleaded not guilty; on a verdict for the plaintiff, on the new assignment, with 30s. damages, it was held that he was not entitled to his full costs. *Cockerel v. Allanson,* 109
2. Where a cause is referred to arbitration, and the costs are to abide the event, the defendant is entitled to them if it appear by the award that the plaintiff's demand is under 40s., which might have recovered in a court of conscience. *Butler v. Grubb,* 217
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1. Covenant on a coal lease to pay a certain proportion or the value of nine hundred weight of the coals to be raised, unless prevented by unavoidable accident from working the pit. Plea that the defendant was prevented by unavoidable accident. It appeared in evidence that the accident might have been remedied at a greater expense than the value of the coals to be raised. Held, that the plaintiff was entitled to recover. *Morris v. Smith,* 279

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1. Devise by R. W. to his eldest son S. W. and the heirs of his body lawfully begotten; and for default of issue of his said son S. W. then to his son H. W. and the heirs of his body. S. W. died in the lifetime of the testator, leaving issue. Held that the devise to S. W. had elapsed, and that the remainder to H. W. vested in possession immediately on the death of the testator. *White v. Warner,* 4
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C. and the heirs of his body, he taking the testator's name. G. P. had only one son, who died without issue, and two daughters, who were the heirs-at-law of the testator. Held by Lord Mansfield and Buller, J., that the words "for default of such issue male" rendered the subsequent devise contingent on there being no son of G. P., and that there having been a son who died, the devise over were void, and the daughters took (as heirs) in fee. Held by Willes, J., that the daughters took joint estates for life, and (semble) remainders in tail. *Keene*, on the dem. of *Pinnock v. Dickson*, 313

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6. Lease *pur autre vie*, to T. P. and his heirs, of a rectory, tithes, and premises. T. P. died, living *cestui que vie*, and by his will devised the premises to M. H. J. his heir-at-law (without saying "his heirs"), with a direction to renew the lease. M. H. J. died, devising the premises by a will attested by two witnesses. Held that the heir-at-law of M. H. J. was entitled to the estate *pur autre vie*. *Philpotts dem. Philpotts v. James* and others, 425

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2. In an action of trespass for cutting a bank, where the question is, whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbor, the opinions of scientific men, as to the effect of such an embankment upon the harbor, are admissible evidence; and evidence may also be given, that other harbors similarly situated, where there are no embankments, have begun to be choked and filled up. *Folkes, Bart., v. Chadd* and others, 157
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Counts on promises to a testator may be joined with counts on promises to the executor, and in answer to a set-off the executor may give in evidence money paid by him as executor. *Gallant v. Bonteflower*, 34

See PLEADING, No. 4.

EXONERETUR.

See BANKRUPT, No. 1.

FINE.

1. Lord Bolinbroke, seised in fee, leased to Stephens for twenty-one years in 1765. In 1770 he granted an annuity to Mrs. Hare, and as security demised the premises in the possession of Stephens to Mrs. Hare for ninety-nine years, if he should so long live, with a proviso that Mrs. H. should the next day re-demise the premises to him for ninety-eight years and eleven months, at and under the said annuity. Mrs. Hare accordingly re-demised. In 1773 Lord B. conveyed the premises to Jones in fee, without notice of the annuity. Jones was in the receipt of the rents from 1773, and in 1775 levied a fine, with proclamations, to himself in fee. The annuity became in arrear in 1774. Five years having passed from the time of the levying of the fine, held that Mrs. Hare was not barred, as her interest had never been divested. *Goodright, on the demise of Hare, v. Board and Jones*, 148
2. A. S., being in wrongful possession of certain estates, devised them to two nephews, whom he appointed executors. The nephews received the rent due in the testator's time, and afterwards levied a fine of the estates. After the levying of the fine, they received the rents accruing in their own time. Held, Willes, J., *dubitante*, that it was rightly left to the jury to say whether the nephews had a sufficient wrongful possession to support the fine; and the jury having found it sufficient, the Court refused to interfere. *Roe, on the dem. of Davis v. Kent and another*, 209

FISHERY.

Quære, Whether a weir, which does not destroy the fry of fish, nor impede navigation, and has existed from time immemorial, is illegal within the statute 2 Hen. 6, c. 15; *Robson v. Robinson*, 307

See RESERVATION.

FOREIGN ATTACHMENT.

See JURISDICTION, No. 2.

FOREIGN COURT.

See JURISDICTION, No. 1. INSURANCE, No. 9, 19.

FORFEITURE.

See EJECTMENT, No. 1.

FRANCHISE.

See ARREST, No. 1.

FRAUDS.

See STATUTE OF FRAUDS.

FREE BENCH.

See COPYHOLD.

GAME.

1. A clergyman having a living of less than £150 per annum is not qualified under stat. 5 Anne, c. 14, to kill game. *Lewards v. Lewis*, 88
2. In an action on the game laws for several penalties, the defendant may pay one penalty into court, the plaintiff being at liberty to go on for the others. *Harcourt v. Knapp*, 214
3. In an action on the stat. 9 Anne, c. 25, § 2, it is sufficient to allege in the declaration that the defendant had a hare in his possession. *Talboys v. Brown*, 344

GREENLAND TRADE.

See INSURANCE, No. 15.

GUARANTEE.

The defendant entered into a bond to the plaintiffs, reciting that the plaintiffs, at the recommendation of the obligor, had agreed to take P. J. into their service and employ as a clerk in their shop and counting-house, and the condition was, that if P. J. should faithfully account for, &c., to the plaintiffs, all such sums as he should receive in the service of the plaintiffs, then, &c. The plaintiffs afterwards took R. B. as a partner into their business. Held that the defendant was liable for money embezzled by P. J. after the new partnership. *David Barclay and Ambrose Benning v. John Lucas*, 321

HUNDRED.

See INSURANCE, No. 5, 18. RIOT ACT.

HUSBAND AND WIFE.

1. The wife of a person who resides in Ireland, herself living in England, and having a separate maintenance under articles of separation, may be sued after the death of her husband for a debt contracted by her in England during his lifetime. *Ringsted and another v. Jane Butler*, widow, Dowager Countess of Lancashire, in Ireland, 197
2. A feme-covert living separate from her husband, and having a competent separate maintenance duly paid to her, may be sued alone on a contract made by her for necessities. *Barwell v. Anne Brooks*, 371
3. By settlement before marriage, 32 cows, &c., and the increase and produce arising therefrom, the property of the woman, are assigned to trustees for her separate use, the husband covenanting to permit her to carry on the trade of a cowkeeper for her sole use. After the marriage, the wife with the profits of her trade purchases four more cows. Held that the settlement was good against the creditors of the husband, and that the cows purchased after marriage are also protected by it. *Husington and another v. Gill and another*, 415

See WITNESS, No. 3.

IMPARLANCE.

See PRACTICE, No. 4.

INDEMNITY.

See BRIBERY.

INDICTMENT.

1. A public officer is indictable for misbehavior in his office. *The King v. Bembridge*, 327
2. Indictment stated that defendants intending unlawfully, &c., and by indirect means, to impoverish H. B., and to hinder him from using his trade, &c., unlawfully conspired, &c., by indirect means, to impoverish H. B., and to hinder him, &c. Held good.—Indictment against F. E., and six others. The issue stated, "And now, that is to say, &c., cometh the said F. E. and others, by H. D., their attorney, and having heard the said indictment read, they say, and each of them severally says, that they are not guilty thereof," &c. After verdict of guilty, held sufficient. *The King v. Freeman Eccles and others*, 337

See OFFICE, No. 1.

INFANCY.

See BILL OF EXCHANGE, No. 1.

INFERIOR COURT.

See JURISDICTION, No. 1.

INSOLVENT ACT.

See PROMISSORY NOTE, No. 1.

INSURANCE.

1. Insurance of the ship *Duras*, "at and from, &c., during her stay and trade, &c., until her safe arrival back at her last port of discharge, &c., upon any kind of goods, and upon the body, &c., of the ship." The ship being lost on the voyage, the goods were transhipped and forwarded by another vessel. Held that the underwriters were liable for an average loss on the goods arising from the capture of the last-mentioned vessel. *Plantamour and others v. Staples*, 1
2. Policy upon any kind of goods, &c., valued at £1000, being on profits expected to arise on the cargo of the ship in the event of her safe arrival at Quebec, and in case of loss the insurers agree to pay the same without any other voucher than the policy. Held that this policy was not void within the 19 G. 2, c. 37, but that the insured were entitled to recover. *Grant v. Parkinson*, 16
3. Insurance at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves. The ship stayed at the coast of Africa several months, and was employed as a receiving ship for slaves, afterwards put on board other ships, which was the employment of a factory ship. Held that this was a deviation. *Hartley v. Baggin*, 39
4. The concealment of letters stating that the vessel is about to sail early the next month is a material concealment, and avoids the policy. *Shirley v. Wilkinson*, 41
5. Where insurers have paid the amount of the loss occasioned by the demolition of a house by rioters, they may maintain an action in the name of the assured against the hundred under stat. 1 G. 1, c. 5, s. 6. *Mason v. Sainsbury and another*, 61
6. Policy on the ship *Elizabeth* from Tortola to London, with warranty to sail with convoy for the voyage. The commander of the convoy sent a ship to bring up the merchantmen from Tortola (the usual mode of conveying ships from that place); but the ship so sent was not to form part of the convoy for the remainder of the voyage. The *Elizabeth* sailed with the ship so sent, but was lost before she joined the commander of the convoy. Held that the warranty was complied with. *Manning v. Gist*, 74
7. A Portuguese ship was insured and warranted neutral. She carried an English supercargo—a fact which was not known to the underwriter, and which was contrary to the French ordinance. On this ground she was captured, and condemned as a prize. Held that the underwriter was liable. *Hague and another v. Walter*, 79
8. A squadron of ships of war, assisted by land forces, having captured two Spanish register-ships. Held that the officers and crews of the squadron have an insurable interest in the ships captured, under the prize act 19 G. 3, c. 67, before condemnation. An average loss opens a valued policy. *Le Cras v. Hughes*, 81
9. A ship warranted Dutch, and sailing under a Dutch name, with a Dutch sea-brief, was captured by the French, and condemned by sentence of the French Court of Admiralty as English property, and by an English name, the sentence not stating the particular grounds of condemnation. Held that this sentence was conclusive evidence that the ship was not Dutch. Semble, that the parties warranting a ship to be neutral are bound to see that she is documented according to the regulations of the belligerent states. *Barzilai v. Lewis*, 126
10. Insurance on ship, cargo, and freight from Tortola to London. The ship was driven back to Tortola, and being found unfit for the voyage, and it being impossible to repair her, was sold. There were no other vessels at Tortola by which the cargo could be forwarded, and it was accordingly sold for nearly the sum insured. The insured having abandoned, Held that this was a total loss. *Manning v. Newham*, 130
11. A. as agent for various persons (but not receiving a *del credere* commission), effected various insurances for his principals with B., an underwriter, upon which insurances various losses and returns of premium were due. B. having become bankrupt, Held that in an action by his

- assignees against A. for the amount of premiums, the latter could not set off the amount of the losses, or of the returns of premium. *Wilson* and another, assignees of *Fletcher*, v. *Creighton* and another, 132
12. An insurance was effected on goods on board any ship or ships from B. to L., sailing within certain dates; and another insurance was effected in the same terms, on the same voyage, within certain other dates. The insurer shipped goods on board two vessels, and, not having the policies, made a declaration before a magistrate that he had shipped goods to the amount of £4889 on board vessel A. under the first policy. Both vessels sailed within the time mentioned in the first policy, and A. was lost. Held that this was a sufficient appropriation of the first policy to the goods on board of A. *Henchman v. Offey*, 135
13. Two prizes being carried into Liverpool, the captor gave orders to effect an insurance on them in London. One of the prizes arriving on Sunday, the owner sent a despatch to his agent in London stating that fact, and expressing fears as to the other ship. The express reached the broker on Tuesday; on that day an entry was made at Lloyd's of the arrival of the vessel at Liverpool. On Wednesday the captor's agent effected an insurance on the other vessel at a premium of fifty guineas per cent., without communicating to the underwriters the fact of the express. Held that this was not a concealment which vitiated the policy. *Court v. Martineau*, 161
14. Warranty that a ship had twenty guns. It is no breach of the warranty that she had only twenty-five men, and that it required sixty men to man twenty guns. *Hide v. Bruce*, 213
15. An insurance upon a ship employed in the Greenland trade, on "ship, tackle, apparel, and furniture," does not by the usage of the trade cover the fishing-tackle. *Hoskins v. Pickersgill*, 222
16. Sailing under the protection of an armed ship not appointed by government as the convoy is not a compliance with a warranty to depart with convoy.
The general rule is, that in order to constitute a sailing with convoy, sailing-orders must be obtained. *Hibbert v. Pigou*, 224
17. Where the captain of a slave-ship mistook Hispaniola for Jamaica, whereby the voyage being retarded, and the water falling short, several of the slaves died for want of water, and others were thrown overboard, it was held that these facts did not support a statement in the declaration, that by the perils of the seas, and contrary winds and currents, the ship was retarded in her voyage, and by reason thereof so much of the water on board was spent, that some of the negroes died for want of sustenance, and others were thrown overboard for the preservation of the rest. *Gregson v. Gilbert*, 232
18. An insurance office, having paid the assured the amount of the loss sustained by him in consequence of a demolishing by rioters, sued by hundreds under the stat. 1 G. 1, st. 2, c. 5, s. 6, in their own names. Held by Lord Mansfield and Buller, J. [Wilkes and Ashurst, JJ., dissentient], that the office was not entitled to recover. *The London Assurance Company v. Sainsbury* and another, 245
19. Where goods were insured, warranted neutral, on board the *Thesis*, "a Tuscan ship," and the ship and goods were captured by the Spaniards, and condemned as a "good and lawful capture," it was held that this sentence was conclusive evidence that the goods were not neutral. *Salucci v. Woodmas*, 345
20. The defendant having chartered a ship, put her up at Lloyd's with notice that she would sail with the first convoy. The plaintiffs shipped goods on board, and insured them with a warranty that the ship should sail with convoy. Before the ship sailed the preliminaries of peace were gazetted, and hostilities on the part of the king's subjects were forbidden, and ships taken by the various powers within certain limits and certain times, were to be restored. Government appointed no convoy, and the ship sailed without, but with French, Spanish, and American passports. No notice was given by the defendant to the plaintiffs that the ship was about to sail without convoy. The ship was run down and lost the day after she sailed. In an action against the defendant for a breach of his contract, whereby the plaintiffs were deprived of the benefit of their policy, Held that the plaintiffs were entitled to recover. *Phillips and another v. Baillie*, 374
21. Policy of insurance "at and from Jamaica to Liverpool, warranted to sail on or before the first of August:" the vessel not sailing before the 1st of August, Held that risk was not divisible, and that the assured was not entitled to a return of any part of the premium. *Meyer v. Gregson*, 402
22. Policy "on goods, specie, and effects," at and from London to Madras and China, with liberty to touch, stay, and trade at any ports, &c., until the vessel shall arrive at her last loading-port in the East Indies or China. Held that, by the usage of the East India trade, this policy covers an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China.
The words "goods, specie, and effects," by the usage of trade, cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges respondentia interest. *Gregory v. Christie*, 419
- See RIOT ACT.
- IRREGULARITY.
- See PROCESS, No. 1.
- JOINDER OF COUNTS.
- See EXECUTOR, No. 1.

JUDGMENT.

1. All judgments relate to the first day of the term, and the priority of one of two judgments signed on the same day cannot be averred. *Lord Porchester v. Petrie*, 261
2. The Court will not set aside a judgment by default to let in a plea of bankruptcy. *Stafford v. Rowntice*, 400
3. Where a judgment by default is set aside on payment of costs, the plaintiff is to be placed in the same situation as if it had not been set aside. *Anonymous*, 431

JURISDICTION.

1. Debt on the judgment of the hundred court of St. Briavell's. Plea, that the cause of action did not arise within the jurisdiction of the inferior court, on demurrer held good. *Herbert v. Cook*, 101
2. In a plea of foreign attachment it must be stated that the garnishee resided within the jurisdiction of the mayor's court. Quere, Whether it is necessary to aver that the defendant below had notice, and that the plaintiff above was indebted to the plaintiff below? *Tamm*, widow, v. *Williams* and another, 281

See RANSOM BILL.

JUSTICE OF THE PEACE.

See NOTICE, No. 1.

LANDLORD AND TENANT.

See ASSIGNEE, No. 1. LEASE, 1.

LEASE.

- J. B., being wrongfully dispossessed of certain premises, executed the following deed:—"Be it remembered that J. B. hath let and by these presents doth demise to R. F. (the premises), as now held by W. F., for the full space or term of twenty-one years, to commence the first day of May or the first day of November, whichever first happens after the said J. B. recovers the said lands from the heirs, &c., the said R. F. covenanting and agreeing, on the foregoing conditions, to pay to the said J. B., &c., the sum of, &c. Leases with power of distress, and clauses of re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said J. B. recovers the lands," &c. Held that this instrument operated as a present demise. *Barry* and another v. *Nugent*, 179

LIBEL.

See VENUE, No. 1.

LIEN.

- Dyers have not a general lien independent of the usage of trade. *Bennet v. Johnson*, 387

LOSS.

See INSURANCE, No. 1, 9, 10.

MAGISTRATE.

See NOTICE, No. 1.

MANDAMUS.

See CORPORATION, No. 2. MAYOR, 1, 2.

MARKET.

The owner of a market within a town who receives stallage for the stalls erected therein on his own land, may maintain an action against a person who erects other stalls within the town upon his own land, for the sale of articles which pay no toll to the owner of the market. *Mosely*, Bart., v. *Chadwick* and another, 117

MARRIAGE.

See CONSPIRACY. HUSBAND AND WIFE, No. 1, 2, 3. PLEADING, No. 6.

MAYOR.

1. The Court will grant a rule for a mandamus to serve the office of mayor, upon an affidavit merely stating the election and refusal. *The King v. Simmons*, 237
2. Where the mayor, who presides at the election of a new mayor, is only mayor *de facto* and not *de jure*, and is subsequently removed by judgment of *ouster*, the election of the new mayor is void, and the Court will grant a *mandamus* for the election of a new mayor under statute 11 Geo. 1, c. 4, although a *quo warranto* is depending against the present mayor. *The King v. The Corporation of Bridgwater*, 379

MESNE PROFITS.

In an action of trespass for *mesne profits* by the lessor of the plaintiff, after a recovery in ejectment, it is no answer to the action that a *remitter damna* has been entered on the record in the action of ejectment. *Harper v. Eyles*, 399

See SPECIAL DAMAGE.

MISBEHAVIOR.

See OFFICE, No. 1.

MORTGAGE.

The mortgagee of a ship cannot sue in his own name for the freight accruing after the mortgage. *Chinnery v. Blackman*, 391

See BANKRUPTCY, No. 4.

MUTUAL CREDIT.

The defendant and one Cox purchased a string of pearls with money advanced by the defendant, and agreed that the profit and loss thereon should be equally divided, Cox paying his share of interest till the pearls were sold. Cox became bankrupt, being indebted at that time to the defendant. The pearls were afterwards sold, and the money was received by the defendant. In an action by the assignees of Cox for his share of the money received, it was held that the defendant was entitled

to set off the debt due from Cox to himself, this being a case of mutual credit within the statute 5 Geo. 2, c. 30, s. 28. *French and others, assignees of Cox v. Penn*, 257

See INSURANCE, No. 11.

NEUTRALITY.

See INSURANCE, No. 9.

NEW ASSIGNMENT.

See COSTS, No. 1.

NEW TRIAL.

1. Motion for new trial on the ground of perjury. *Macpherson v. Petrie*, 26
2. Motion for new trial on the ground of perjury, or to stay proceedings. *Petrie v. Milles*, 27
3. After a conviction for perjury, it is no ground for a new trial that the jury hesitated in giving their verdict; nor will the Court receive affidavits of the jurymen stating that they did not intend to find a verdict of guilty. *The King v. Parker*, 242
4. *Indebitatus assumptit* for goods sold and delivered. *Plea plene administravit*. It appeared that the goods were sold to be paid for on the marriage of the plaintiff, which did not happen till fifteen years after the sale. Objection at the trial, that this being a special contract could not be given in evidence under this form of declaration. Verdict for plaintiff. On motion for new trial, Held, that whether the form of the declaration was right or not, the Court would look to the merits; and, as no injustice had been done, they would not grant a new trial. *Stokes v. Saunders*, administratrix, 401
5. On a new trial a fresh notice of trial is necessary. *Bingley v. Mallison*, 402

NOTICE.

In a notice of action against a justice of the peace, an endorsement on the notice of action, "given under my hand at Durham," is not a sufficient endorsement of the attorney's place of abode within the statute 24 Geo. 2, c. 44, s. 1. *Taylor v. Fenwick*, 178

NUISANCE.

Trespass brought by order of the Court of Chancery, to try whether a bank erected by the plaintiff was a nuisance to the harbor of Wells. The jury found for the defendants, and accompanied the verdict with the following observations, which were endorsed on the *postea*. "The jury also find that they all agree that the continuance of the bank is some injury to the harbor, but are not all agreed to its being a material injury. That it did not appear to the jury that any legal proceedings were had within the space of twenty years from the time of the erection of the bank." Held, that this finding was no ground for setting aside the verdict, either as showing

that the nuisance was immaterial, or that the possession of the bank by the plaintiff for twenty years was a bar. *Folkes v. Chadd and others*, 340

OFFICE.

A public officer is indictable for misbehavior in his office. *The King v. Benbridge*, 327

PARTNERSHIP.

By articles of partnership it was covenanted that the trade (of a brewer) should continue for eleven years, with a proviso, that if either of the parties should be so minded, on giving six months' notice to the other, he should be at liberty to quit the trade and mystery of a brewer, and the other party should be at liberty to continue the trade on his own account. Held, that the party giving notice could not carry on the trade on his own account. *Cooper v. Watson*, 413

PAYMENT INTO COURT.

In an action against a coach-owner for losing a trunk, the defendant was allowed to pay into Court the amount of the sum to which he had by notice limited his responsibility. *Hutton v. Bolton*, 59

PENALTY.

See GAME, No. 2. BRIBERY.

PERJURY.

Where a true bill for perjury had been found against two of several witnesses upon whose evidence a verdict had been obtained, the Court refused to grant a new trial.

Before a new trial can be granted, a probable ground must be laid to show that the verdict was obtained by perjury. *Benfield v. Petrie*, 24

See EVIDENCE, No. 4.

PETITIONING CREDITOR'S DEBT.

See BILL OF EXCHANGE, No. 5.

PLEADING.

1. Debt on bond conditioned to pay £50, in case the defendant should not procure J. H., then impressed, to appear and deliver himself whenever he should be called upon. 1st plea, that J. H. was not called upon, &c.; 2d plea, that J. H. was unlawfully impressed, and that it was unlawfully agreed between the plaintiff and J. H. that the plaintiff should discharge J. H., who should pay as a gratuity, &c.; and that defendant, at the request of J. H., became bound for the payment. Replication to first plea, that the plaintiff called upon and required the defendant to procure J. H. to appear. Special demurrer thereto, and general demurrer to 2d plea. Held, that both the first and second pleas were good. *Pole v. Horrobin*, 91

2. In an action of debt for a penalty under 2 Geo. 3, c. 20, s. 16, for acting as a major of militia without being duly qualified, it is sufficient to aver that the defendant acted as such major, "not being in manner qualified by the laws and statutes of the realm." *Roberts, qui tam, v. Irvine*, 194

3. Action on a promissory note made in favor of one J. M. Plea, the statute of usury. Replication, protesting the corrupt agreement between defendant and J. M., states that defendant did not, in pursuance of any such corrupt agreement, nor for any such purposes as are in the plea mentioned, make the note, and concluding to the country. Special demurrer on the ground that the replication should have concluded with a verification, and so held. *Mulliner v. Wilkes*, 218

4. Where an executor pleads the general issue and *plene administravit*, and the former plea is found against him and the latter for him, he is entitled to the *postea*. *Coleson v. Drinkwater*, 239

5. Debt on bond conditioned for the payment of £5000 at certain times, and performance of covenants in an indenture. Plea, stating the payment of the money at the times, and performance of the covenants. Replication that the defendant did not pay the money *modo et forma*, and concluding to the country. Special demurrer on the ground that the replication ought to have concluded with a verification. Held, that the conclusion to the country was good. *Busk v. Leake*, 255

6. Declaration for goods sold and delivered. Plea, coverture of the defendant in abatement. Replication, that at the time of the making the promises defendant was living separate and apart from her husband in adultery, and that she made the promises on her own credit, and for her own necessary use, &c. Demurrer. Held, that the plea was bad in abatement, as not giving a better writ. *Turtle v. Lady Worsley*, 290

7. In an action on a charter-party by which the defendants covenanted to unload and receive the cargo at Charlestown, and then and there put on board 100 tons of goods, &c., the plaintiffs assigned as a breach that no goods were put on board. The defendants, after *oyer* of the charter-party, in which there was a proviso that the freight of the homeward cargo should be paid on delivery at London, pleaded that the vessel never arrived in London on the homeward voyage, but was lost. On demurrer, the plea was held bad. *Stephenson v. Price* and another, 353

8. Action on a charter-party for not loading a ship. The defendant (being under terms to plead *issuably*) pleaded that a survey of the ship was had by order of the Admiralty Court of St. Kitt's, and she was declared insufficient; wherefore, &c. Held, that this was not an issuable plea, and that the plaintiff might sign judgment. *Valle v. Gardiner*, 354

See CONDITION PRECEDENT, No. 1. EXECUTOR, No. 1.

POSTEA.

See PLEADING, No. 4.

POWER.

The Countess of Burlington by will devised certain estates to trustees to the use of W. Lord Cavendish for life; remainder to trustees to preserve, &c.; remainder to the use of one or more of such of the child or children of W. Lord C. for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisos, restrictions, &c., as the said W. Lord C. should by any deed, &c., or by his last will, &c., direct, limit, or appoint. W. Lord C. by his will devised the premises to trustees to the use of his son Richard for life; remainder to trustees to preserve; remainder to trustees for a term, for providing jointures and portions for the wife and children of Richard; remainder to the first and every other son of Richard in tail male; with remainder to testator's son George for life, and the sons of that son in tail male; remainder to his eldest son William in fee. The will contained considerable bequests of personality to all the children. Held that this was a good execution of the power, and that if not good as to the children of Richard, that the limitation to George took effect. *Doe, on the dem. of the Dukes of Devonshire and Portland, and Duchess of Portland, his wife, v. Lord George Henry Cavendish*, 48

POWER OF ATTORNEY.

Virtualising-bills are not assignable, but by usage a power of attorney to the attorney, his substitutes and assigns, to receive the money, authorizes the attorney to assign. Such a power is called a general power, in contradistinction to a special power, which authorizes the attorney only to receive. Where an attorney, acting under the latter power, deposited certain virtualising-bills with the defendant as a security for money borrowed from him, in an action of trover by the payee of the bills, Held that the plaintiff was entitled to recover. *Tonkin v. Fuller*, 300

PRACTICE.

1. Where a prisoner is supersedeable, he may be detained by the same plaintiff for another cause of action; but if in his affidavit the plaintiff includes the cause of action on which the defendant is supersedeable, the Court will discharge the defendant on filing common bail. *Cookson v. Foster*, 254

2. The Court will not discharge on common bail a defendant held to bail on a judge's order granted upon the copy of an affidavit of the debt made at Hamburg, authenticated by the magistrates of that city, and corroborated by the affidavit of persons here to the credit of the party making the affidavit. *Bovars v. Bessacsti*, 336

3. Where the original writ is against two,

and the plaintiff declares against them separately, the Court will not set aside the proceedings. *Durant v. Scrofield*, 400
 4. The Court will not grant a rule for an imparlance; the defendant may take it without. *Philips v. Hardinge*, 414

See WITNESS, No. 2. PAYMENT INTO COURT. COSTS.

PRINCIPAL.

See BAIL, No. 1. AGENT. INSURANCE, No. 11.

PRISONER.

See PRACTICE, No. 1.

PRIZE MONEY.

See RANSOM BILL. APPRENTICE, No. 1. INSURANCE, Nos. 7 and 8.

PROCESS.

Where there is an irregularity in the notice at the foot of the copy of a *latitat* which is served in November, an application to set aside the proceedings for irregularity made at the end of Hilary Term is too late. *Elan v. Rees*, 382

See PRACTICE, No. 11.

PROMISSORY NOTE.

Where a debtor is discharged under an insolvent act, and afterwards gives a promissory note for a debt due before, there is a good consideration for such note, and he may be sued upon it. *Best v. Barber*, 188

PROTEST.

See BILL OF EXCHANGE, No. 4.

PROXY.

A proxy made by a canon to act for him in his absence in all corporate business is not revoked by the canon making the proxy having, in an intermediate period, appeared and acted for himself. *Eyre v. Lovell* and another, 66

QUALIFICATION.

See GAME, No. 1.

QUO WARRANTO.

See MAYOR, No. 2.

RANSOM BILL.

Action on a ransom bill containing a clause that the bill should be enforced, though the hostage should die or the vessel be retaken. Plea, that before the captor got into port he was taken, with the hostage and ransom-bill on board; and being required to deliver up all papers, fraudulently did not deliver up the ransom-bill. Demurrer. Held by Lord Mansfield that the plea was bad; but by the other justices, that the Court had no jurisdiction,

this being a matter of prize, cognizable by the Admiralty Court. *Anthorn v. Fisher*, 166

REASONABLE TIME.

See BILL OF EXCHANGE, No. 2, 3.

RENT.

ASSIGNER. FINE, No. 2.

REPLEVIN.

A recovery in replevin is a bar to an action for excessive distress. *Phillips v. Berryman*, 287

RESERVATION.

A. being seised of a mill, and having a sole fishery in the waters of the mill, granted the mill, with all waters, streams, &c., necessary in working the same, "except and always reserving the right and privilege of fishing in the waters of the said mill." Held, that this was an exception of the sole fishery, and not a reservation of a new easement. *Lord Paget v. Milla*, 43

See COMMON, No. 1.

RESIGNATION.

See BOND OF RESIGNATION, No. 1, 2.

RETAINER.

See ATTORNEY.

RIOT ACT.

An action may be maintained under st. 1 G. 1, st. 2, c. 5, against hundredors, by the trustee in whom the property in a house of correction, belonging to the county, is vested, for the demolition of the house by rioters. *Onslow v. Smith* and another, 348

See INSURANCE, Nos. 1 and 18.

SCHOOLMASTER.

In ejectment against a schoolmaster who has been removed by sentence of the trustees of the school for misbehavior, it is not necessary for the lessors of the plaintiff to prove the grounds of the sentence, nor can the defendant disprove them.

The defendant may give in evidence the declarations of a former trustee who signed the sentence, and who is since dead, for the purpose of showing that his signature was corruptly obtained.

Where the constables of a township are (amongst others) made trustees of a school, in ejectment by the trustees against the schoolmaster, it is sufficient to show that the constable acted as such, without proving his election and swearing in. *Do* on the dem. of *Davy* and others v. *Haddon*, 310

SCRIVENER.

See BANKRUPTCY, No. 3.

SET-OFF.

See EXECUTOR, No. 1.

SALVAGE.

See BOTTOMRY BOND, No. 1.

SHERIFF.

1. The sheriff having returned the writ, may be ruled on the same day to bring in the body; and if he disobey, may be attached; but the Court will, at the instance of the defendant, set aside the attachment on payment of costs in case there are merits. *Goodwin v. Montague*, 235
2. Semble, that a bond to a sheriff, the condition of which recites that the sheriff, by virtue of *f. fa.*, had seized and taken in execution of the goods and chattels of R. V. divers goods and chattels, and that the sheriff, at the request of the obligor, had quitted possession, and agreed to return *sulla bona*, and then for indemnifying the sheriff for so doing, is illegal. *Wright v. Lord Verney*, 240

See BANKRUPTCY, No. 6.

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See INSURANCE, CARRIER, MORTGAGE, BANKRUPTCY.

SLANDER.

Words imputing a crime are actionable, although they describe it in vulgar language, and not in technical terms. *Colman v. Godwin*, 90

SPECIAL DAMAGE.

In trespass for meane profits after ejectment for the recovery of a house used as an inn, the plaintiff cannot recover the loss which he has sustained by the defendant shutting up the inn, and destroying the custom, unless the damage be specially stated in the declaration. *Dunn v. Large*, 335

STATUTE OF FRAUDS.

A. and B. came to the plaintiff's warehouse and agreed for a parcel of goods for A., and B. said he would guarantee the payment. A. afterwards came alone and ordered other goods, when the plaintiff sent to B. and asked him whether he would engage for A. B. replied, "I will pay you if he does not." The goods were subsequently delivered to A. Held that this was a collateral promise by B., and required to be in writing by the statute of frauds. *Peckham v. Faria*, 13

STAYING PROCEEDINGS.

See COSTS.

SUBPŒNA.

See WITNESS, No. 1, 4.

SUPERSEDEAS.

See PRACTICE, No. 1.

TERM.

See EVIDENCE, No. 5.

TITHE.

Where turnips are drawn in small quantities at a time, the tithe may be set out by placing aside every tenth turnip, and it is not necessary to place the tithe in heaps, unless the farmer gathers the turnips into heaps for himself. *Blamey v. Whittaker*, 183

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TRESPASS.

Trespass for breaking and entering close and digging coals. Plea, that close was part of fee-farm lands of R., that (10 Jac. 1) the mines under those lands were granted, &c., and derives title under the grant and justifies. Replication, that no right of entry accrued within twenty years of the trespass. Issue thereon. Evidence that the grantees had dug, within twenty years, under other fee-farm lands in R.; but no evidence of digging under the plaintiff's. Evidence also, that plaintiff, or his predecessors, had not dug. Held that the defendants were not barred. *Hodgkinson v. Fletcher* and others, 31

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been made to the witness to know whether he will appear. *Worsley. Bart. v. Bisset*, 58

3. In an action by a woman suing as a *femme sole*, her husband is an incompetent witness for the defendant to prove her marriage. *Bentley v. Cooke*, 422
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END OF VOL. III.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

IN THE

TWENTY-SECOND, TWENTY-THIRD, TWENTY-FOURTH, AND TWENTY-FIFTH YEARS OF THE REIGN OF GEORGE III.

FROM THE MANUSCRIPTS OF

THE RIGHT HON. SYLVESTER DOUGLAS,

BARON GLENBERVIE.

AND ALSO FROM THE MANUSCRIPTS OF

MR. JUSTICE LAWRENCE, MR. JUSTICE LE BLANC,
MR. GEORGE WILSON, ETC.

VOL. IV.

BY MR. SERJ. FRERE & HENRY ROSCOE, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

IN THE TWENTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

EADES v. VANDEPUT. Nov. 9.

The master of an apprentice is entitled to the wages earned by him in a man-of-war ; and may recover them from the captain, although the latter had no notice of the apprenticeship beyond the assertion of the apprentice.

THIS was an action brought by the master of an apprentice against the captain of a man-of-war, for the wages of the apprentice, during the time he had served on board the defendant's ship, and which the defendant had received from government. The cause was tried at Guildhall, at the sittings after last Trinity Term, before BULLER, J., when a verdict was found for the plaintiff.

Erskine now moved for a rule to show cause why there should not be a new trial, on the ground that the defendant had no other evidence that the boy was an apprentice but his own assertion ; which he contended was not sufficient to make it incumbent upon the defendant to discharge him. The boy had been clothed by the Marine Society, and sent on board the defendant's ship. *Erskine* admitted that if the indenture, or other sufficient proof, had been produced, the captain would have been bound to discharge him, and answerable in this action ; but said it would be very inconvenient and prejudicial to the service, if merely upon the allegation of the party himself, that he is an apprentice, the captain of a man-of-war were bound to discharge, or liable [2] to an action for the wages earned on board his ship. He *stated from affidavits, that, by the usage of the navy, the captains of men-of-war are permitted to take a certain number of boys as their servants, who are rated on the books as seamen, but the captain receives their wages : that this is considered as a valuable perquisite, and great encouragement to the service ; but if the captain were exposed to actions on the grounds like the present, it would not have that effect, and might be attended with great inconvenience ; for that, on the moment when a ship was setting sail, all the boys on board might come and claim to be discharged as being apprentices : that there were but two ways of discharging an apprentice from the sea service ; 1, by carrying his indenture, properly verified, to the admiralty, upon which an order is made for his discharge ; or 2, by *habeas corpus*.

Lord MANSFIELD.—There are several other methods. One is by warrant from me. This method I found in use when I came into the office of Chief Justice. It had been often exercised by Lord HARDWICKE, and I have frequently granted such warrants.

BULLER, Justice.—That authority is founded on a statute of Henry VIII., and is confined to the Chief Justice. The effect of the warrant is to discharge the apprentice in the first instance, without bringing him before the Chief Justice.

Lord MANSFIELD.—The plaintiff is clearly entitled to recovery. The information of the boy was not conclusive; but it was sufficient to make it necessary for the defendant to inquire into the truth of the case.

The rule refused.¹

¹ See Cursan, administratrix, v. Watts, B. R., H. 24 Geo. 3, ante, vol. iii. p. 350.

By 2 and 3 Anne, c. 6, § 17, it is enacted, "That when the apprentices of owners or masters of merchant ships shall be impressed, or voluntarily enter themselves in the king's service, the masters shall be entitled to *able seaman's* wages for such of their apprentices as shall, upon due examination, be found duly qualified for the same, notwithstanding their indentures of apprenticeship." But the above case was not considered as being affected by that statute.

*MACKENZIE v. MAYLOR and Others. Nov. 10.

[*3]

A captain in the army sent with his company on board a man-of-war (by order of the admiral of the fleet with which they were sailing) and there acting as marines, is not entitled to share prize-money as captain of marines: if he were so entitled, he might maintain an action in a court of law to recover the prize-money.

THIS was an action for money had and received, which was tried at Guildhall, before BULLER, J., at the sittings after last Trinity Term, when the plaintiff was nonsuited.

Wilson moved for a rule to show cause why the nonsuit should not be set aside, and a new trial granted. He stated the case shortly as follows:

The plaintiff was a captain in the seventy-third regiment; the defendants were agents for the prizes taken by Lord Rodney in spring, 1780, when he sailed with the fleet to relieve Gibraltar. The plaintiff, with the rest of his regiment, had gone from England as a passenger on board a transport, with the fleet under Admiral Lord Rodney, being destined for Gibraltar. In the course of the voyage the fleet captured some Spanish merchantmen, upon which the admiral manned the captured ships with sailors from his men-of-war, for the purpose of navigating them to England; and to supply their place, the marines on board some of the men-of-war were employed at the guns as sailors; and some of the land forces were taken from the transports and put on board the men-of-war, to serve as marines. In this manner the plaintiff with his regiment was sent on board the Prince George man-of-war, where they did the duty of marines, and were put upon full allowance, the plaintiff regularly mounting guard, and acting in all other respects as a marine officer. After this, and during the passage to Gibraltar, another fleet of Spanish merchantmen was captured, and the prizes sent to England, condemned, and sold. The claim of the plaintiff was for a captain of marines' share of the money arising from the sale of the last-mentioned prizes.

During the trial a note was produced of what had passed at Guildhall at the trial of *Wemyss v. Linzee*, before Lord MANSFIELD, in which his Lordship was stated to have expressed a doubt, whether an action at common law would lie in such a case.

Wilson, in moving for the rule, insisted that such actions had been frequently maintained, and the jurisdiction of the Court never questioned: and he contended that the plaintiff was in all respects to be considered as a captain of marines *on board the *Prince George* at the time the latter capture [*4] was made: that he had been put into that ship, to act as captain, by the authority of the admiral, an authority delegated to him by the admiralty; and therefore ought to be on the same footing as if he had been directly appointed by the admiralty, as captain of a complement of marines serving on board that ship.

Lord MANSFIELD said he thought this was not a question of prize. That question has been decided by the condemnation. The only inquiry in this action is, what share of the ships *already condemned as prizes* the plaintiff is entitled to, under the act of¹ Parliament and the King's proclamation. I have tried a great many such actions, and many points have been settled by me relative to the persons entitled to share.

The case stood over to this day, when his Lordship said he had looked into the printed report of *Wemyss v. Linzee*, B. R., H. 20 Geo. 3, *supra*, vol. i. 324, and that what he is there stated to have said in summing up the case to the jury corresponded exactly with his own recollection, namely, that if it had not been agreed to try the question by that action, there might have been a difficulty for want of proper parties: but that he had not entertained any doubt of the jurisdiction. He therefore thought the plaintiff ought not to have been nonsuited on that ground; but on the merits, he said, there was no ground for granting a new trial: that the former case was decided on the ground that the complement of marines is appointed by the admiralty only, to which complement nobody can add; and not on the minute circumstances of the case. The plaintiff was no officer of the complement of marines on board the ship. The former complement remained. Nothing that Lord Rodney could do could give the plaintiff the right of sharing.

Rule refused.

¹ The statute relative to Spanish prizes is 20 Geo. 3, c. 28.

[*5]

*DAVIES v. COOPER. *Nov.*

After a judge's order for time to enter the issue, the defendant may sign judgment of *non pros.*, immediately on the expiration of the time, without giving the plaintiff twenty-four hours more.

This was a rule to show cause why a judgment of *non pros.*, signed for not entering the issue, should not be set aside as irregular.

The irregularity insisted on was, that the judgment was signed before the expiration of a Judge's order for a week's time to enter the issue. But the judgment was held regular, and the rule discharged.

In this case it was agreed by the Court that a party has not twenty-four hours to enter the issue, after the expiration of a Judge's order; but that judgment may be signed as soon as the time given by the order is out.

HARRINGTON v. KLOPROGGE.¹ *Nov. 12.*

A condition to assign all offices is a valid condition; and will be taken to apply to such offices as are by law assignable.

This was an action of debt upon a bond. The defendant craved *oyer* of the bond and condition, and set them forth upon the record. The bond was

¹ S. C., cited 2 Chitty's Rep. 475; 2 Rr. & B. 678 (a).

in the common form. The condition recited that the defendant, together with the plaintiff, had become bound jointly and severally to one Thomas Newnham in a prior bond, conditioned for the payment of an annuity of £100 during the life of the defendant, and had executed a warrant of attorney to Newnham to confess judgment thereon, for the better securing the payment of the annuity. That the plaintiff had entered into those securities at the request of the defendant, who had received the whole of the consideration money which was paid by Newnham for the annuity; and that the defendant, in order to indemnify the plaintiff from the payment of the annuity, had agreed when and so soon as he should become possessed of, or entitled to, any commission, post, place, salary, pension, or pay whatsoever, that then he should and would immediately execute a proper assignment thereof to the plaintiff, and fully and effectually authorize and empower *him to receive and take the whole fees, profits, and emoluments thereof; and [*6] in the mean time, and until such event should happen, that he should and would from time to time pay to the plaintiff all such sums as he should receive on account of his being private secretary to the Earl of Holderness. The condition then declared, in the usual way, that if the defendant should perform the said agreement, and also should save the plaintiff harmless from the payment of the said annuity, and from all actions, suits, costs, and damages, on account of the said joint bond and warrant of attorney of the defendant and the plaintiff, then the bond to be void, otherwise to remain of full force.

The defendant then pleaded, that he had only remained a certain time, which he specified, after the execution of the bond, as private secretary to the Earl of Holderness; that he had not, since the making of the bond, become possessed of, or entitled to, any commission, post, place, salary, pension, or pay whatsoever; that while he continued such private secretary, he had paid over the profits of that office to the plaintiff, and had indemnified him in the manner stipulated by the agreement recited in the condition.

The plaintiff replied:—1. That the defendant had, during his continuance as private secretary to the Earl of Holderness, received divers sums of money on account of his being such secretary, which he had not paid to the plaintiff; 2. (according to the form of the statute, 8 & 9 W. 3, c. 11, § 8). That the plaintiff had been obliged to pay a sum of money to Newnham in discharge of the arrears of the annuity, which the defendant had not repaid, nor indemnified the plaintiff from the payment thereof.

The defendant joined issue on the first breach, and demurred generally to the second.

Morgan, for the defendant, took exception to the condition, as being void:—1. Under the statute of Edw. 6, 5 & 6 E. 6, c. 16, against buying and selling offices; 2. By the common law.

1. This is an unqualified condition to assign *all* offices, and therefore extends to offices, the sale of which is prohibited expressly by that statute.

*2. There are many offices which, even at common law, are not [*7] assignable.¹

Hence, therefore, on both grounds, the performance of this condition might become impossible; and a condition which cannot be performed is void.

Bower was to have argued on the other side, but was stopped by Lord MANSFIELD.

¹ Vide *Harrington v. Du Chatel*, Canv. H. 23 G. 3; Bro. C. C. 124, which decides that where a person in a place of trust agrees to recommend another to an office, for money, such agreement is void, as against public policy, though the office is not within 5 & 6 E. 6. See also *Palmer v. Bate*, C. B., E. 2 G. 4, 2 B. & B. 673.

Lord MANSFIELD.—The condition is clearly valid as to all offices which by law are assignable, and void as to those which are not.

Judgment for the plaintiff.

WEBSTER and Others v. SCALES. Nov. 12.

A bankrupt may sue as a trustee, though he is also a *cestui que* trust under the same instrument.

THIS was an action of debt upon a bond, which the declaration stated to have been made to the plaintiffs Webster, Brown, and Hawkins, by the description of three of the trustees of Samuel Gower Poole, of Chelsea, in the county of Middlesex, brewer.

The defendant pleaded (besides *non est factum*) that after the execution of the bond, and before the commencement of this action, Hawkins had become a bankrupt; that a commission had been sued out against him; and that the commissioners, before the commencement of that action, had assigned, among other things, all the said Hawkins's right and interest in the bond, and the debt and cause of action mentioned in the declaration; by reason whereof, and of the statutes in that case made and provided, the assignees became, and were entitled to, such right, debt, interest, and cause of action.

The replication first set forth the condition, which was a common condition for the payment of half the penal sum with interest; and then stated that, before the making of the bond, the said Poole, by an indenture between him of the first part, the plaintiffs, and five others, creditors of the said Poole, [*8] and *trustees for the purposes therein mentioned, of the second part, and the several other persons whose names were set down in the first schedule thereunder written, who should execute that indenture, being also creditors of Poole, of the third part (of which indenture *profert* was made), assigned to the said trustees, amongst other things, certain messuages and leasehold estates and effects then under mortgage; and that it was thereby declared that they should hold the said leasehold premises and effects upon trust, with all convenient speed, to concur with the mortgagees in the sale thereof; that by virtue of the said indenture, the trustees possessed themselves of the estates thereby assigned; after which the plaintiffs, as three of the trustees, sold part of the said assigned premises to the defendant for a sum of money, which he agreed to pay to them as such trustees, on behalf of themselves and the other trustees, and that, for securing the payment of part of the purchase money, he became bound to the plaintiffs, as such trustees, by the bond in the declaration mentioned, in the penal sum therein specified.

The defendant craved *oyer* of the indenture and schedules, which were set forth. By the indenture it appeared, that the principal trust was to pay the money arising from the estates assigned, by equal dividends, to the creditors executing the indenture, and the surplus, if any, to Poole, and that any three of the trustees were to have power to act; and in the first schedule Hawkins's name appeared in the list of the creditors, with a blank for the sum owing to him. The defendant then demurred generally to the replication.

Lambe, in support of the demurrer, argued that as it had been settled very lately in this court that, where there are several plaintiffs, the bankruptcy of one of them is a good plea in bar to the action, *Marlar v. Hartley*, H. 24 G. 3, cited *infra*, in notes to *Allen v. Hartley*, the question here would be, how far the present case would fall within that rule. He admitted that

where a bankrupt is a mere naked trustee, without any beneficial interest to himself, the property and rights vested in him as trustee to his assignees; but he said it appeared here upon the record, that Hawkins was not only a trustee under the trust-deed, but a creditor; and he relied on the words of the statute (1 Jac. 1, c. 15, § 13), of 1 Jac. 1, *whereby the commissioners are authorized to assign all debts, not only "due to," but "for [*9] the benefit of," the bankrupt.

Law was to have argued on the other side,¹ but was stopped by the Court.

Lord MANSFIELD.—There is no color for this demurrer. If Hawkins is also a *cestui que trust*, that does not vary the case. His assignees may come against the trustees for the amount of his beneficial interest.

Judgment for the plaintiffs.

¹ *Law* meant to have cited 4 Inst. 85; Knight v. Cole, C. B., E. 2 W. & M., 3 Lev. 278; Ludlow v. Browning, B. R., M. 6 Ann. 11 Mod. 138; Crisp v. Pratt, Mar. 88; Cope-man v. Gallant, Canc. T. 1716; 1 P. Williams, 814; ex parte Ellis, Canc., 31st March, 1742; 1 Atk. 101; Howard v. Jemmet, B. R., H. 8 Geo. 8, 8 Burr. 1369; 1 W. Blackst. 400.

KINGSTON v. LONG and Others.¹ Nov. 12.

An order to pay money, "provided certain terms are complied with," cannot be available as a bill of exchange.

THE declaration in this case stated in the first count, that one Ledwick, on the 14th of May, 1783, made a bill of exchange, directed to the defendants, and thereby, ninety days after sight of that his second of exchange (the first third and fourth of the same tenor and date not paid), required the defendants, "provided the terms mentioned to them in letters of that date were complied with," to pay one Welch, who was furnished with those letters, or order, the sum of £500, value in account; that Welch endorsed the said bill to the order of Murroughs; that it was afterwards accepted by the defendants, and then endorsed to the plaintiff.

To this count of the declaration the defendant demurred generally; and the case was argued this day by *Chambre* in support of the demurrer, and *Wilson* for the plaintiff.

Chambre stated his objections to be, 1. That there was no averment in the declaration that the condition mentioned in the bill had been complied with, without which it certainly was not payable. 2. That even if there had been such an averment, the action could not have been maintained; because this was no bill of exchange, nor a negotiable instrument, being conditional only, and depending on an unknown *and uncertain contingency; whereas a bill of exchange ought to be payable absolutely, [*10] and at all events.

The Court desired to hear the other side.

Wilson, for the plaintiff, contended that as the drawer had given all the appearance of a negotiable bill to the instrument, it ought to be presumed that the condition was such as would not prevent its negotiability. It is described as a bill of exchange in words, and the defendants have accepted it. After that act of theirs, it ought to be intended that the condition had been complied with; and though there might have been a doubt and ambiguity before, the bill from that time must be considered as absolute and unconditional. At least it ought to be so considered as between the acceptor and any other person; whatever might be the case as between the drawer

¹ S. C., cited Bayley on Bills, 13, 4th edit.

and acceptor. On behalf of third persons everything ought to be presumed against those who have given it the form of a bill of exchange, and have sent it into the world as such. This case does not resemble the instances of qualified bills, which have been determined not to be negotiable, as where the words were, *C. B. Dawkes v. Lord Deloraine*, T. 11 Geo. 3, 3 Wilson, 209; 2 W. Blackst. 782; "Pay out of William Stewart's money as soon as you receive it;" or, *Jocelin v. Laserre*, Fort. 281; 10 Mod. 294, 316; "Pay out of my growing subsistence." For in those instances the uncertainty of the fund appears upon the face of the bill. But here the terms of the condition do not appear; and they ought to be taken most strongly against the parties drawing and accepting.

LORD MANSFIELD.—Unless this is a bill of exchange, it is not assignable; and if it is not assignable, the plaintiff has no right to recover. It was not a bill of exchange in its creation, it could never become so afterwards; and this certainly was not one at first, because it was made payable only upon a contingency. A bill of exchange must be payable at all events.

BULLER, Justice.—This is not so like a negotiable bill as that cited by Mr. Wilson, where the words were, "pay out of William Stewart's money." For there might have been a reasonable ground, in that case, of contending that the acceptance was an acknowledgment that there was money of the fund [11] mentioned in the hands of the acceptor. It is not true that the drawer has given this instrument all the appearance of a bill of exchange; for it appears on the face of it that it is not to be payable at all events, but only upon a contingency. Judgment for the defendants.¹

¹ See *Hill v. Halford*, Exch. Chamb. E. 41 G. 3, 2 Bos. & Pul. 418; *Leeds v. Lancashire*, 2 Camp. N. P. C. 205.

CÆSAR v. ———. Nov.

A defendant charged as endorser of a note may obtain a rule to inspect it; on affidavit that he never endorsed, or had in possession, any such note.

BALDWIN moved for a rule to show cause why the defendant, his attorney, or such persons as he should appoint, should not have leave to inspect two notes of £500 each, on which the plaintiff brought this action against the defendant as endorser, and why a statement of the place of abode of the plaintiff should not be given to the defendant; on affidavit of the defendant that he never endorsed, or ever had in his possession any such notes.

Rule granted.¹

¹ Vide *Threlfall v. Webster*, C. B., H. 3 & 4 G. 4, 1 Bingham. 161; 7 B. Moore, 559, 8 C.; *Hildyard v. Smith*, C. B. H. 4 & 5 G. 4, 1 Bingham. 451; 8 B. Moore, 586, S. C.; *Tidd's Pr.* 689, 8th edit.

The KING v. The Inhabitants of SHARRINGTON.¹ Nov. 13.

Where a servant is disabled by an accident, and after his recovery tenders himself within the year to return to his master, who refuses to receive him; the settlement of the servant is not prevented by such refusal.

By an order of two justices for the county of Norfolk, Robert Lound was removed from the parish of Letheringsett to the parish of Sharrington, in that county; and upon an appeal to the Quarter Sessions the order of removal was confirmed, subject to the opinion of the Court on a case which stated,

¹ S. C., 2 Bott. 383.

That the pauper, having gained a settlement at Sharrington, hired himself for a year to one Hardy, a brewer in Letheringsett, to drive his team and do other work : that he *continued in the service of Hardy for seven [*12] weeks, at the end of which time, as he was driving the beer wagon, and standing on the shafts, being then in liquor, he fell off, and broke his thigh : that he was carried to an hospital at Norwich, where he continued twenty-nine weeks, and, after he had been there about three weeks, Hardy came to him and told him, if he wanted anything to let him know : that when he left the hospital he went to Sharrington, and next morning to Hardy's ; and that Hardy refused to take him, and offered to pay him for the seven weeks, and to make him a present, which the pauper refused to take ; and thereupon Hardy said he would go to a neighboring justice ; upon which he returned to Sharrington. On the Friday following the pauper and Hardy went before the justice, but nothing being done, he again returned to Sharrington, and continued there upwards of fourteen weeks ; and then by an order of two justices, dated the 30th of September, 1783, he was sent to Hardy, who then also refused to take him ; but the pauper continued from that time at a public-house in the parish of Letheringsett till the 7th of January, when he was removed, by the order appealed from, to Sharrington.

The case was to have been argued this day, but no counsel appeared in support of the orders, and, without hearing *Bearcroft* and *Joddrell*, who were for the appellants, Lord MANSFIELD and WILLES, Justices, said this was clearly a sufficient service to gain a settlement, the pauper having tendered himself to his master after his recovery.

ASHURST and BULLER, Justices, absent.

Both orders quashed.¹

¹ Vide *Newby v. Wiltshire*, B. R., E. 25 Geo. 3, post, and the cases cited in the note to that case.

The KING v. The Inhabitants of EALING.¹ Nov. 13.

An order of removal unappealed from, to a certificated parish from a third parish, is conclusive against the certificated parish, on a removal to the certifying parish.

THE Court of Quarter Sessions for the county of Essex confirmed an order of two justices for the removal of Ann Chetwyn, widow, and her two children, aged eight and four years, from the parish of Barking to the parish of Ealing. *The order of justices found that the paupers were become [*13] actually chargeable to the parish of Barking, and upon the hearing of the appeal the following facts were stated for the opinion of the Court :

That in the year 1783 a certificate was granted by the parish of Ealing to the parish of Barking, acknowledging Joseph Chetwyn to be legally settled at Ealing. Under this certificate he resided in Barking, where his son, the husband of Ann Chetwyn, was born. Afterwards Ann Chetwyn went with her children to reside in the parish of St. Matthew, Bethnal Green, from whence they were removed in 1779 by an order of justices (as likely to become chargeable) to Barking, as the place of their settlement. From that order the parish of Barking made no appeal ; and the paupers remained in Barking from the time of such removal, till, by the order now appealed from, they were removed, under the certificate, from thence to the parish of Ealing.

Wilson and *Fenshawe* argued in support of the rule, and cited the case of *Osgathorp v. Diseworth*, E. 19 Geo. 2, 2 Str. 1256, where a pauper having been removed from Diseworth to Osgathorp, and that order having been

¹ S. C., Cald. 472 ; 2 Bott, 879. Vide *Rex v. Towcester*, H. 25 G. 3, infra.

quashed upon an appeal, he was by a second order removed to Osgathorp as a certificate-man; and, upon an appeal, it was stated that the first order was before he became chargeable, and the second after he became so. The Sessions and the Court of King's Bench confirmed this second order, and the Court said, the first order was premature; the consequence of which only is, that the pauper must be suffered to remain till he doth become chargeable, but not to make a premature order final for ever.

Wilson, however, admitted that, whatever objection there might be to the principle of cases, in which it had been held that an order unappealed from is conclusive as to all the world, they were too numerous and uniform to be shaken, *Malendine v. Hunsdon*, B. R., H. 12 Ann.; *Chalbury v. Chipping Faringdon*, and 12 Will. 3, 2 Salk. 488; *Rex v. Northfeatherston*, E. 5, G. 2, 1 Sess. Ca. 154; *Rex v. Woodchester*, M. 16 G. 2, 2 Str. 1172; *Burr. Settl. Cases*, No. 67; *Sutton St. Nicholas v. Leverington*, T. 21 and 22 G. 2, *Burr. Settl. Cases*, No. 96; *Godalming v. St. Michael's*, E. 15 Geo. 2, cited *Burr. Settl. Cases*, No. 96; *Rex v. Hinckworth*, H. 18 Geo. 3, *supra*, vol. i. 46, note 1; *Rex v. Catterall*, H. 57 G. 3, 6 M. & S. 83.

Lord MANSFIELD.—The case cited does not apply. The first order in this case, not having been appealed from, is conclusive.

ASHURST and BULLER, Justices, absent. Both the orders quashed.

[*14] *The KING v. the MAYOR, ALDERMEN, ASSISTANTS, and COMMON COUNCIL, and the FREE-BURGESSES of COLCHESTER. Nov. 16.

When a corporator is duly elected mayor, he may be compelled to take the office, either by mandamus or indictment: but when it is admitted that the election has been merely a pretence and contrivance, the Court will grant a mandamus, under 11 G. 1, to proceed to another election.

On Monday, the 8th of November, *Mingay* moved for a rule to show cause why a mandamus should not issue to the defendants, commanding them to proceed to the election of a new mayor, on the ground that Sir Robert Smyth, who was elected on the charter day, had refused to be sworn in, and take the office upon him, and that his election was a mere pretence, and a contrivance to enable the preceding mayor to hold over.

BULLER, Justice.—A corporator, duly elected, cannot refuse to take upon himself the office of mayor.

Lord MANSFIELD.—You may indict him.

Mingay then moved for and obtained a rule to show cause why a mandamus should not issue to Sir Robert Smyth, commanding him to take upon himself the office.

But this day, *Bearcroft*, on the part of the defendants, having admitted that the election of Sir Robert Smyth was a contrivance, and consenting that there should be a new election, the last-mentioned rule was discharged, and an absolute rule was made agreeably to *Mingay's* first motion, viz., that a writ of mandamus should issue, directed to the mayor, aldermen, assistants, and common council of the borough of Colchester, and also to the free-burgesses of the commonalty of the said borough, commanding them and every of them to assemble themselves at the Moot-hall, within the said borough, on the 2d of December next, between nine and twelve o'clock in the forenoon, and then and there proceed to the nomination, election, and swearing in of a mayor of the said borough, and to do every other act necessary to be done by them, or any of them, for that *purpose, according to the form

[*15] of the statute, 11 G. 1, c. 4: and it was further ordered, that public

notice in writing, of the day appointed by the said writ for the election, should be affixed in the market-place or some other public place, by the town-clerk, for the space of six days previous to the day appointed for the election.

BARRY v. ALEXANDER.¹ Nov. 16.

The Court will compel a plaintiff to produce written documents, on which an action is founded, for the defendant to inspect and copy; if the defendant states facts which throw a doubt upon their existence or import. *Semb.* The Court will interfere in all cases where a discovery might be obtained by a bill in equity.

ON Monday, the 8th of November, *Law* obtained a rule to show cause why the defendant, his attorney or agent, should not have leave to inspect and take copies of the several letters supposed to have been written by the defendant to the plaintiff relative to the matter in question in this cause, and also of all other papers relative thereto, in the custody of the plaintiff or his attorney, with liberty to examine them, paying a reasonable price for such copies; and why all proceedings in the mean time should not be stayed. The affidavit on which the rule was obtained stated, that by the declaration in this cause it appeared that the supposed cause of action arose, on several promises by the defendant to the plaintiff to pay a considerable debt due to him from one *Tims*, upon the plaintiff's desisting to proceed against *Tims*; that such pretended promises were contained in several letters written to the plaintiff by the defendant, and then in the custody of the plaintiff's attorney in *Lincoln's-Inn*; that the defendant's attorney and he himself, had applied to the attorney of the plaintiff for an inspection of the letters and papers upon which the action was founded, but without effect; that the defendant had resided in *East Florida* for some years last past, where all his books, papers, and accounts still remained; that he had no copies of his letters to the plaintiff, nor any perfect recollection of their contents, and was therefore unable to instruct his attorney how to make his defence; and that he was a total stranger to any promise for the payment of any debt of *Tims*, as stated in the declaration.

**Law* said, he moved on a precedent of a similar rule granted in [16] another case.

Lee and *Baldwin* now showed cause. They contended that this motion was of the first impression: it went to a discovery of the whole of the plaintiff's case before the trial: the defendant might just as reasonably desire leave to examine by anticipation the witnesses meant to be called by the plaintiff. It is not directly sworn that the papers wanted are the ground of the action. The former case must have been a policy cause; and the rule obtained, a rule to inspect certain specified instruments of a public nature, as the policy, protests, &c.

Law in answer said, that the rule to which he had referred was in a policy cause, but was conceived in the same general terms with the present, and was made absolute: that, however, the present rule was drawn up in more general terms than he had moved it; and that he was willing to confine it to the letters.

LORD MANSFIELD.—The rule is too large, if it demands other papers. It must be confined to the letters. To that extent I think it very reasonable.

BULLER, Justice.—There have been many motions similar to this, much litigated in this court; and LORD MANSFIELD has upon such occasions always

¹ S. C., cited 1 Tidd's Pr. 641, 8th ed.

said, that if the papers of which the inspection and leave to copy them is prayed are such as the party could get at on a bill in equity for a discovery, the application ought to be complied with, to avoid the expense and delay of the remedy by bill.

The rule, as to letters, made absolute.¹

¹ See the cases cited, 1 Tidd's Pr. 641, 8th ed., 1 Phillip's Evid. 488, 7th ed.

[*17] *PETERKIN v. SAMPSON and Another, Bail of SAMPSON.²
Nov. 16.

Where a defendant is held to bail in an action of tort, the bail are only liable, as for damages, to the sum in which he is held to bail, though more be given by the jury; but they are liable, beyond that sum, to the full taxed costs.

IN an action of assault against the original defendant, the plaintiff, upon a special affidavit, obtained a judge's order to hold him to bail for £20; and accordingly, after his arrest, and bail below, the present defendants entered into a recognisance before a judge, in the common form, i. e. they jointly and severally undertook that, if the original defendant should be condemned in that action at the suit of the plaintiff, he should pay the costs and condemnation-money, or render himself into the custody of the Marshal of the Marshalsea of the court, or that they would pay the costs and condemnation-money for him. They afterwards justified in court, by swearing that they were severally worth the sum of £40, over and above all their just debts.

The cause being tried, a verdict was found for the plaintiff, with £150 damages and 40s. costs; and the costs *ad incrementum* were taxed at £46 10s.; making together £198 10s.; for which sum the plaintiff signed judgment, and took out execution; and the defendant not being found, he proceeded by *scire facias* against the bail for the whole £198 10s. The bail appeared; and in Trinity Term last, before the plaintiff had declared on the *scire facias*, Runnington obtained a rule to show cause why, upon their paying into court the sum of £20, together with the plaintiff's costs of the application, all further proceedings on the writ of *scire facias* should not be stayed.

On Monday, the 8th of November, *Baldwin* showed cause. He admitted that the bail above are not liable for more than the sum sworn to as damages, *Jackson v. Hassel*, B. R., H. 20 G. 3 *supra*, vol. i. p. 330, although the amount given by the jury should exceed that sum; but contended that, as to the costs, they are answerable for whatever they come to on the Master's taxation. The recognisance, he observed, mentions no specific sum, but is a general undertaking for the condemnation-money and the costs. As to the [*18] condemnation-money, it may be proper to confine the liability *of the bail to the sum liquidated upon holding the defendant to bail;³ but the costs are left entirely at large.

The Court, being of opinion with *Baldwin*, made the rule absolute in the following terms: "That the defendants should pay to the plaintiff's attorney £88 10s. being the amount of £20, for which the defendants became bail for Sampson at the suit of the plaintiff, and the costs in the said cause, together with the costs of this application."

Some days afterwards Runnington endeavored to have the rule altered, on the ground that the sum in which the bail justifies (in this case £40) is in the nature of a penal sum in a bond, and that by analogy to the case of bonds the redress against them could never go beyond that sum.

¹ B. C., cited 1 Tidd's Pr. 282, 8th ed.

² That seems more applicable to cases where special bail is of course, and the sum is liquidated by the plaintiff himself in his affidavit.

The Court seemed at first to think there was weight in that argument, but upon speaking to the Master, and considering the terms of the recognisance, they this day confirmed the rule, as at first made absolute.

The KING v. MEYLER. Nov. 17.

On the trial of an indictment for a misdemeanor, either by commission of oyer and terminer or gaol-delivery, the defendant must appear in person (*Semb.* that this is by force of the recognisance), but, after appearance, may be dismissed on entering into another recognisance to appear to receive judgment.

BEARCROFT moved for a *certiorari* to remove an indictment for perjury in London from the Old Bailey sessions to this court, upon affidavits tending to show that the defendant's life would be in danger if she were to appear and undergo a trial at the Old Bailey: that the prosecution was groundless and malicious, instituted by a discarded servant in revenge for a charge of theft, which her mistress, the defendant, had brought against her; and that the prosecutrix had made repeated applications for a compromise.

The object of this application was, to move, after the indictment should have been removed, that the defendant's personal appearance might be dispensed with. Bearcroft said that the Court at the Old Bailey could not dispense with her appearance; that the Court has a larger jurisdiction on the London side than on the Middlesex side, having, on the former, commissions both of oyer and terminer and gaol-delivery,* and, on the latter, of gaol-delivery only; but that they had not the power, under either com- [*19] missions, to dispense with a defendant's appearance even on an indictment for a misdemeanor, no such power being exercised on the circuits when the trial is on the crown side, though the Court there sits under both commissions. This seemed, after some discussion, to be the general sense of the bench and the bar.

BULLER, Justice.—When an indictment is found, a *capias* issues; and if it is for a bailable offence, as in this instance, the defendant enters into a recognisance¹ to appear at the trial. This defendant must have done so; and therefore, when the trial is called on, she may appear *pro forma*, and enter into another recognisance to appear again to receive judgment. That will answer the purpose of the present application.

To this Lord MANSFIELD and the rest of the Court assented; and WILLES, Justice, said he should sit at the next sessions at the Old Bailey, and would recollect, if the application was made there, what had been the understanding of the Court upon the subject.

¹ It appears that the whole difficulty arises from the recognisance. For the general rule is, that in an indictment for a trespass the defendant may make an attorney after plea, R. 22 Assis. 78. Otherwise in treason or felony, 2 Hale, P. C. c. 28.

DURRANT v. LAWRENCE. Nov. 17.

If a plaintiff inadvertently grants oyer of the original, the Court will not strike it out after plea in abatement.

THE defendant having craved oyer of the original, which was granted, he made it the foundation of a plea in abatement.

Chambre now moved for a rule to show cause why the oyer should not be

struck out of the pleadings, on the ground that a defendant is not entitled to it; and that, if he prays oyer of the writ, the plaintiff may proceed without taking any notice of such prayer. *Boates v. Edwards*, B. R., T. 19 G. 3, supra vol. i. p. 227. It was, he said, by a mere blunder of a clerk that the oyer was granted.

*[20] LORD MANSFIELD.—As the plaintiff has granted it, he must take the consequence. It was his own blunder. Rule refused.¹

¹ See *Durrant v. Serecoid*, B. R., E. 24 G. 3, ante, vol. iii.

ALLEN and Others, Assignees of MARLAR, a Bankrupt, and DOWN v. HARTLEY and Another.¹ Nov. 17.

1. To support a joint commission of bankruptcy, there must be separate acts of bankruptcy by each partner.²
2. A joint commission against two out of three partners is bad.³
3. A plea in an action that was discontinued, and wherein no judgment was entered is not admissible evidence against the party pleading it of a fact therein averred. In assumpsit by several plaintiffs, bankruptcy of one, and an assignment of his effects, is a good plea in bar.

THIS was an action on a promissory note for £8000 made by the defendants, payable to Marlar, Stewart, and Boyd, and endorsed by them to Marlar, Pell, and Down. Marlar had been found a bankrupt; and his assignees, together with Down, were the plaintiffs, Marlar and Down being the surviving partners of Pell, who had lately died.

The cause was tried at Guildhall, at the sittings after last Trinity Term,⁴ before BULLER, J., when the plaintiffs were nonsuited.

On the first day of this term, *Bearcroft* obtained a rule to show cause why the nonsuit should not be set aside, and a new trial granted; and this day the case was argued by *Bearcroft*, *Piggott*, and *Baldwin* for the plaintiffs, and *Lee*, *Erskine*, and *Wood* for the defendants. From the Judge's report it appeared, that at the trial, the execution of the note by the defendants being proved, those plaintiffs who sued as *assignees of Marlar [21] in order to establish their title, gave in evidence a joint commission of bankruptcy against Marlar, Stewart, and Boyd, as surviving partners of one Allen, and another of a prior date against Marlar and Stewart, as partners of Boyd and surviving partners of Allen. But it was proved, that there was no such distinct partnership as Marlar and Stewart, exclusive of Boyd (as indeed appeared upon the face of the commission against the two): and the Judge was of opinion that, under that commission, the plaintiffs, the assignees, could not support their title; for that a joint commission against two of three partners was void. This had been the idea of those whose advice the assignees had followed; for, soon after the commission had been

¹ There is a note of this case in Co. Bankr. Law, 11, 8th ed.; and it was cited, and approved by the Court, for the doctrine in the second point here stated, in *Streatfield v. Halliday*, 8 T. R., 779; also in *Scott v. Franklin*, 15 East, 486.

² So in *Hogg v. Bridges*, C. B., H. 58 Geo. 3, 2 B. Moore, 122, it was held that the assignees of A and B, bankrupts under a joint commission, could not maintain an action for money had and received; it appearing that A alone had committed an act of bankruptcy; and also that, under such commission, they could not recover the separate property of A.

³ But now by the 6 Geo. 4, c. 16, s. 16 (continuing the provision of the 3 Geo. 4, c. 81, s. 8), any creditor who may petition for a commission against a whole firm may petition against any number of the partners of it, and the commission will be valid. *Eden's Bankrupt Law*, 61, 2d ed.

⁴ On Wednesday, the 14th of July.

sued out against Marlar and Stewart, the other was obtained against all the three, and a new assignment made to the same assignees. However, upon the evidence it turned out that nothing but a collusive act of bankruptcy could be proved against Boyd; who, upon the supposed invalidity of the former commission, had been sent for from abroad, and, by concert with the petitioning creditor and the assignees, had been denied to a creditor. Here again the plaintiffs failed, in the opinion of the Judge; for he held, that the commission against the three could not give the assignees any right to recover in this action, without proof of a distinct act of bankruptcy by each. The counsel for the plaintiffs, foreseeing both these objections, had begun by producing the office copy of a record in a former action brought on this very note against the same defendants, which they offered as evidence, if not conclusive, at least admissible, of the bankruptcy of Boyd, as well as of the other two. That action appeared to have been brought in the names of Marlar, Pell, and Down, the endorsees of the note before the death of Pell. The defendants pleaded in bar, 1, the general issue; 2, that before the making of the note Marlar was a trader, and in partnership with Stewart and Boyd as surviving partners of Allen; that they all three became bankrupts, and that a commission was sued out against them; and so proceeded to state specially all the formal proceedings under the commission, including the assignment to the plaintiff, Allen, and his co-assignees. To this plea the plaintiffs had demurred, and showed for cause, that the matter pleaded was not matter of bar, but of abatement. It appeared that the *demurrer had been argued;¹ but the counsel for the plaintiffs finding [*22] the opinion of the Court to be against them, a rule to discontinue was obtained, and no judgment entered. The Judge thought this was not competent evidence to sustain the bankruptcy, 1. Because there was also a plea of the general issue; and if both pleas were taken together, which he thought they must be, then the note itself would be overturned: and 2. Because a plea, especially since the statute permitting several matters to be pleaded, when there has been no judgment, nor any act done by the party to avail himself of the plea, is to be considered as the mere allegation of counsel, and no evidence of the facts therein asserted, against the persons by whom it is pleaded.

In support of the motion for the new trial, the three different points which had been overruled at Guildhall were again insisted upon.

¹ Marlar v. Hartley was argued, H. 24 G. 3, by *Morgan* for the plaintiffs, and *Wood* for the defendants. For the plaintiffs it was contended, that bankruptcy is a dilatory, not a peremptory, exception; for that the capacity to sue may be restored, as by superseding the commission: and it was compared to a plea of profession in the plaintiff, which, it was said, could only be pleaded in bar when the demand was incurred after the profession; and *Lutw. 17*, was quoted; from whence it appears, that upon a plea that the plaintiff is excommunicated, the writ shall not abate, but *loquela remaneat, sine die, quousque, &c.*, till plaintiff shall obtain absolution. But the Court said, that it was matter of bar, and could not be pleaded in abatement; since there could be no better writ given to the plaintiffs. It was also contended, that the two solvent plaintiffs might recover their proportion of the demand without Marlar, on the authority of *Nelthorpe and Another v. Donington*, B. R., M. 26 Car. 2, 2 Lev. 118. But the authority of that case was not allowed by the Court, who said it had been questioned in *Fox v. Hanbury*, B. R., E. 16 G. 3, Cowp. 445; and they said it was now settled, that where a defendant will take advantage of a demand being joint against him and others, he must plead it in abatement—*Rice v. Shute*, 10 G. 3, 5 Burr. 2611, 2 W. Blackst. 695; and *Abbot v. Smith*, C. B., E. 14 G. 3, 2 W. Blackst. 47; but that he may nonsuit the plaintiff by showing that the cause of action arose from a contract made with him and others jointly. Vide *Webster v. Scales*, *supra*, p. 7. And see a learned note on these points, 1 Williams, Saund. p. 291, b. and *Germain v. Frederick*, B. R., T. 25 G. 3, there reported. This case was accidentally omitted in its proper place.

[*23] 1. As to the validity of the commission against Marlar *and Stewart, the counsel for the plaintiffs contended that those two persons had submitted to that commission; and therefore, if it should be held necessary, to support a joint commission against two, that there should be an exclusive partnership subsisting between them, this submission was an admission on their part of such partnership, and conclusive as between them and the rest of the world. But upon what principle or decision is this necessity of an exclusive partnership founded? In the case of *Crisp*, a bankrupt, there was a separate commission sued out against *Crisp*, upon a joint debt owing by him and two other partners: upon an application to the Court of Chancery, Lord HARDWICKE directed¹ that an action should be brought in the Court of Common Pleas, to try the validity of the commission; and upon the trial, WILLES, C. J., reserved a case for the opinion of the Court; and there it was determined, after solemn argument, that the commission was valid.² This decision was adopted by Lord HARDWICKE, 2d Aug. 1744, 1 Atk. 133-4; and was posterior in point of date to the case of *Beasley v. Beasley*, Canc. 1736; 1 Atk. 97; which will be cited on the other side. From this decision it appears, that for a partnership debt a separate commission might have been sued out against Marlar, and, in like manner, another separate commission against Stewart; and under each of those commissions all the property of every sort belonging to each would have been vested in the commissioners and assignees. But why should the unnecessary trouble and expense of a commission against each become necessary?—a joint commission against the two would have, in all respects, the same effect as separate commissions against each. By the joint commission against the two, all the property of each would be equally divested, as if two commissions had issued, one against each; and, by marshalling the partnership and respective debts, the Court of Chancery would appropriate and fix the relative order and mode of paying the joint and separate creditors of each, in the same manner as if there had been two commissions. The objection on this part of the case seems to be founded on an idea that it is the trade, not the trader, that is made a bankrupt: but that is not the case: bankruptcy goes [*24] to the *person, not to the particular branch of business in respect to which the act of bankruptcy is committed. Whatever that may be, as soon as the bankruptcy happens, all the bankrupt's property, and not merely what is employed in that branch, vests in the commissioners.

2. But if it should be the opinion of the Court, that to vest the property of Marlar in assignees under the statutes of bankruptcy, either a separate commission, or one against the whole partnership, was necessary, still it was not necessary in a case like this, where the demand was for a debt in which he alone of the three partners, against whom the second joint commission issued, was a creditor, to prove an act of bankruptcy by each. It is perhaps true, that the practice has been to require such proof in the case of joint commissions; but that practice has been established with a view to those instances where the demand was founded on a joint debt due to all. Is it not, in point of principle and reason, sufficient, when the demand is only a debt due to Marlar, to show that he has committed an act of bankruptcy? Why should not the joint commission in such a case, though void as against the two, operate against him as a separate commission sued out on a joint debt? If this would be reasonable and consistent with principle, it is incumbent upon the counsel for the defendants to show some express authority to the contrary. The objection is grounded only on form, not on the merits;

¹ By an order, dated 18th Feb. 1742-3.

² See a full report of this case, by the name of *Crisp v. Perrett*, Willes, 467.

and therefore the Court will not give way to it, unless they are compelled by the cogency of positive law.

8. Lastly, supposing it necessary to show the bankruptcy of Boyd, the plea in the former action ought to have been received as conclusive, or at least *prima facie* evidence of such bankruptcy. In the case of Snow v. Phillips, reported by Siderfin, B. R., M. 16 Car. 2, 1 Siderf. 220-1; it was held that a bill in Chancery, preferred by the same party, if proceedings have been had upon it, is evidence against him of the matters alleged in the bill. *A fortiori*, a plea at common law, which is of a more solemn nature than a bill in Chancery, ought to be evidence against the person pleading of the allegations contained in it. On this plea proceedings were had, for a solemn argument took place: the plaintiffs by demurring admitted the truth of the facts alleged as fully as if they had been found against them [*25] *upon the trial of an issue, and by discontinuing the action gave the defendants the full benefit of their plea. What a contradiction would it be, and how repugnant to justice, to say, that in the former action the defendants shall have the benefit of the allegation, that Marlar, Stewart, and Boyd were each of them bankrupts, and dead in law, and yet that in this, which is founded upon the defeat of the plaintiffs in the former, they may deny that very allegation! Shall they be permitted to assert the fact when they can derive a benefit from it, and to deny it when it makes against them? It is said, that to allow the special plea in this case, where there was also a plea of the general issue, to be evidence against the defendants, would be to defeat the advantage of the statute, which gives the permission to plead double. That would be true, if this plea were offered in evidence to overturn or contradict; as if a plea of *solvit ad diem* were to be made use of to contradict another of *non est factum*. But this is a very different case; nor does it seem to be at all a necessary consequence that, if this plea is taken to be evidence against the defendants, the allegation in the plea of the general issue is to be also received as evidence of the non-existence of the debt. Upon that plea no further proceedings were had. Besides, though a man's allegations, when they come to make against him, are to be considered as admissions on his part, it does by no means follow that other allegations of his, made at the same time, which operate in his favor, must be taken as true. There is a case in the law of Nisi Prius, of Taylor v. Holman, Guildhall sittings after term, 1764; Bull. N. P., 2d edit. p. 169; which seems very much in point upon this question. In an action of debt against an executor, the defendant had pleaded *plene administravit*; and the plaintiff admitting the truth of the plea had taken judgment of future assets, *quando acciderint*. Afterwards an action being brought upon this judgment, suggesting a *devastavit*, Lord MANSFIELD would not suffer the plaintiff to give any evidence of effects come to the hands of the defendant before the judgment, because the plaintiff had admitted that the defendant had fully administered to that time. It may be said, that it would be hard if a sham plea, as the common one of a judgment recovered, should be considered as evidence afterwards against the defendant. In the first *place, would it follow that if [*26] such a plea—which is, as it were, a common bar, and is perfectly understood to be used merely for delay—should be held not to be evidence, that other pleas of a different description are not? In the second place, in the case of a plea of judgment recovered, it is hard to conceive how it could be offered in evidence in a subsequent case; for if an action were brought on such supposed judgment, not the plea, but the judgment itself, must be produced. But, lastly, where would be the hardship upon a party who asserts a matter deliberately in a plea, to hold him bound not to contradict that assertion afterwards?

For the defendant it was argued,

1. That it would be absurd to support a commission against A. and B. as partners, when no such partnership ever existed, and when the commission itself stated that they were joint partners with C.

2. That it was settled law, that in all cases, to support a joint commission of bankruptcy against partners, a separate act of bankruptcy must be proved against each of the partners. This was expressly laid down by Lord HARDWICKE in the case of *Beasley v. Beasley*, cited *supra*. See also *Twiss v. Massey*, Canc. 1737, 1 Atk. 67; and the universal practice of the commissioners has been consonant to that determination. There is one argument which alone shows that it must be so: it has been long settled, that where there has been only a joint commission, separate creditors may come on the separate estate of each, without having recourse to separate commissions; but this would be extremely absurd, if the joint commission had not been grounded on the separate bankruptcy of each.

3. The case in *Siderfin*, with regard to bills in Chancery, has been often overruled, and the contrary settled as law in a variety of modern decisions. In the case of *Lord Ferrers v. Shirley*, reported by Fitzgibbon, B. R., H. 4 G. 2, Fitz-G. 195-7, a bill in Chancery, to which there had been an answer, was offered in evidence in an action against the party who had preferred it; but upon an objection that a bill was no better than the surmises of counsel for the better discovery of title, the Court would not suffer it to be read. So in *Medcalfe v. Medcalfe*, 1 Atk. 63, 65, in Canc. 1737, though Lord HARDWICKE, in Chancery, permitted a bill preferred *by the plaintiff to [27] be read against him, he said, that at law the rule of evidence is, that it cannot be received in evidence, because it is taken to be the mere suggestions of counsel. And in a case before Lord MANSFIELD at Nisi Prius in the year 1767, his lordship laid down the same doctrine. The reason is equally strong against the admission of this plea in evidence, which, for anything the Court knows, may be, as special pleas since the introduction of pleading double frequently are, the mere suggestions of counsel. Besides, how can it be reasonably insisted upon, that the one plea shall be received in evidence, and not the other? If both were to be received, the first, of the general issue, would defeat the action.

Lord MANSFIELD.—A bill in Chancery is not evidence in another suit, except merely to show that there was such a bill preferred, and the nature and object of it.

The plaintiffs, Allen and others, set up two commissions under which they claim as assignees. There is no doubt but a commission may be taken out against one partner, or against all the partnership; in which latter case the assignees may take not only the joint but the separate effects, and the Court of Chancery will marshal the creditors. What are the objections here? To one of the commissions it is objected that it is against three, and only two were bankrupts. This is clearly bad. No authority has been produced to show that it is good against the two. It is the same thing as if no commission had issued. To the other commission the objection is that it is against two of three partners. This too is bad, and is supported by no authority.

As to the plea, if it were evidence at all, I should hold it to be conclusive. But the plaintiffs discontinued. There was no judgment: no effectual proceedings: no use made of the plea. If there had been judgment, and the defendants had made use of it, the case would have been different. The defendants might have withdrawn or amended this plea. There is no case remotely tending to the doctrine that loose pleadings under counsel's hand shall be evidence. An answer in equity is evidence, because it is upon oath. Where a man under his hand avers a thing, he shall be bound by it; but a

man is not bound by his bill in equity, and no man avers his plea to be true, in such a manner as to be bound by what, on better advice, as matter of pleading he thinks *fit to abandon. I am clear on all the three [*28] grounds that the direction was right.

The rule discharged.

PRESTON, Executor of FOULIS, v. GREENWOOD. Nov. 17.

1. Usage is admissible in evidence to explain the construction of a policy of insurance, in the parts written by the parties, as well as in the common printed form. 2. If the question be, whether the addition of a place, by name, in a policy, would have varied the risk, or whether, on the other hand, such place was implied in the words actually used, it is material evidence, in favor of the latter construction, that the premium in either case would have been the same.

THIS was an action on a policy of insurance, which was tried before BULLER, Justice, at Guildhall, at the sittings after last Trinity Term, when a verdict was found for the defendant.

On Wednesday the 10th of November, *Bearcroft* obtained a rule to show cause why a new trial should not be granted; and the case was now argued by *Bearcroft*, *Erskine*, and *Bower* for the plaintiff, and *Lee* and *Wilson* for the defendant.

The material facts, as reported by BULLER, Justice, were as follows:

The policy was on the ship the *Earl of Hertford* "from London to Madras and Bengal, or the ship's last port of discharge of her Europe cargo beyond the Cape of Good Hope." On the 1st of January, 1781, the owners (of whom Foulis was one) entered into the usual charter-party with the East India Company, at the head of which instrument was written "For China," that being the customary method of expressing the destination of the ship. The policy was not effected till May; and the ship did not sail till June, in the same year. By the terms of the charter-party the Governors and the Presidencies of the Company abroad might alter the destination of the ship after her arrival in India, and might employ her in intermediate voyages in that country. Part of the outward-bound cargo was destined for China. On her arrival at Madras a considerable part of her cargo was unloaded; and she was sent by the Governor and Council to Masulipatam. Before she could be unloaded, she was driven on shore in the Madras road by a violent storm, and totally lost, having still on board that part of her cargo which was intended for China. The premium was 15 guineas per cent.

Bonham and Dallas, two eminent and experienced brokers, who were produced as witnesses on the part of the plaintiff, proved that it is notorious, and well understood by *the underwriters, that East India ships are subject to the control of the foreign Presidencies, and [*29] liable to be employed in intermediate voyages in India, and to have their course altered. But they said that, by the usage of their offices, when China was meant to be included in the policy, the word "China" was particularly expressed,¹ and that this was the description of a "Coast and Bay"

¹ As had been done in the policies in three causes which had been tried before BULLER, Justice, at the sittings at Guildhall, after last Easter Term, viz. *Gregory v. Christie* (ante, vol. iii. p. 419), *Jackson v. Macaulay*, and *Moffat v. Ward*.

In the first, the words were, "at and from London to Madras and China, with leave to touch, stay, and trade at any port or ports whatsoever, until the ship shall be arrived at her loading-port in India and China." In the second, which was on the same ship, viz. the *Fortitude*, the only difference from the other was, that the policy concluded, "until the ship shall be arrived at Madras and China." In *Moffat v. Ward*, which was also tried before BULLER, Justice, at the same sittings, the policy was on the ship *Blandford*, and concluded, "until the ship's safe arrival at her last port of discharge in the East Indies or China."

voyage. They did not agree in the form of words used by them to describe the other parts of the voyage. They said (and in this they were corroborated by a third broker) that there was no difference in the premium, whether the insurance were to Madras and Bengal, as in the present instance, or to Madras and China.

In summing up to the jury, the Judge told them the question was whether a China voyage was insured, which must depend on the words of the policy. That the underwriter knows nothing of and has nothing to do with the charter-party, and all he need to take notice of is the usage as to the voyage insured. He thought there was no doubt but the intermediate voyage was protected, and said that the words of the policy were certainly large enough to cover the voyage to China; but that Bonham and Dallas had proved, that they always specified China by name when they insured voyages to that country; and there was no usage proved of insuring a China voyage by the present form of words; and directed them that, if they found the usage to be always to describe China in words, their verdict should be for the defendant, otherwise for the plaintiff.

[*30] On the part of the plaintiff it was contended, 1. That the *evidence of usage ought not in this case to have been left to the jury; 2. That upon the whole case the verdict was against evidence.

1. It is a general rule, where the words of a written contract are plain and unambiguous, that they are not to be interpreted by extrinsic evidence. What was the subject-matter of this insurance?—a voyage clearly intended at the first for China, as is manifest from the charter-party, which was entered into long before the insurance was effected, and from the nature of part of the cargo. As to the parties contracting, the insured must certainly have meant that the policy should extend to China, because his object was to protect his property, which he could not do by insuring a different voyage from that which the ship was to perform. With regard to the insurers, it appears that their premium would not have been higher if China had been expressly mentioned; and though it may be the custom of some brokers to insert the word when the voyage is intended, yet where an expression tantamount is used, that comes to the same thing; and the parties are not to be permitted to narrow the words they have bound themselves by, and restrain them to a sense more favorable to themselves than what they obviously import. It is true, evidence of usage is often properly admitted in the construction of policies of insurance; but it should seem the following distinction ought to be made: in construing the ancient formal clauses of the instrument, such evidence is proper, to show how they are and universally have been understood; but in the interpretation of that part which is framed or adopted by the parties to the particular instrument, and contains the description of what they mean as the more immediate object of their contract, they ought not to be permitted to call in the aid of extrinsic evidence to control and vary the plain obvious sense of the words which they have themselves chosen to employ.

2. The evidence given does not weaken the plaintiff's case. It did not appear that the brokers employed had ever added the word "China" to a policy where the former part of the policy was worded as in this case. In the case of *Gregory v. Christie*, *Jackson v. Macaulay*, and *Moffat v. Ward*, it was necessary to specify "China;" because, if the words "India," or "the East Indies," only, had been used, a voyage to China would certainly not have [*31] been protected; since that *country in common language is never considered as comprehended under the word "India" or "the East Indies." But here the words being "or the last port of discharge beyond

¹ Previous to the trial of *Gregory v. Christie* (ante, vol. iii. p. 419), at the same Vol. XXVI.—21

the Cape of Good Hope," which as clearly extend to China as to any part of India, the specific mention of that country became totally unnecessary. At most, the evidence of the brokers amounts to nothing more than proof of their opinion. There was no instance shown of any case like the present, where, upon a loss happening, the underwriters had refused to pay on account of the omission of the word "China."

But if this case is so new, if it is *res integra*, and the Court entertain a doubt, they will not conclude the question by this verdict, but send it back again to another jury for further consideration.

For the defendant it was contended, that evidence of usage is always received to interpret the words of mercantile contracts, and that upon the evidence in this case the scale preponderated very strongly in favor of the defendant. It is well known that there are two sorts of East India voyages—the one called the "Coast and Bay" voyage, which is that described in this policy; the other called the China voyage. The distinction between these voyages is so universally understood, that no underwriter could suppose he was insuring a China voyage by a policy in which Madras and Bengal are only mentioned. There is a fallacy in saying the premium is equal. That may be true whether the voyage be *from London to Madras and China, or from London to Madras and Bengal: but by the construction [*32] insisted upon by the counsel for this plaintiff, this policy would have protected a voyage from London to Madras, Bengal, and China, and yet the risk in that case would be much increased, and the premium certainly higher.

[That the premium would have been higher if China had been mentioned was stated by Mr. *Thoresby*, the attorney for the defendant, though he could not state to what amount, nor mention any particular instance.]

On the other hand, the counsel of the plaintiff in answer to a question from Lord MANSFIELD said, that the defence on the ground now insisted on came upon them by surprise at the trial, for that they had only expected the objection which had been made in the former cause of *Preston v. Hobson* (*note, supra*).

LORD MANSFIELD.—Usage is always considered in construing policies of insurance, even when no difficulty arises on the words themselves. But here, even on the words, it is doubtful to me whether the protection extends beyond the East Indies. There are two sorts of voyages, and the distinction between them is notorious. Now the policy having specified Madras and Bengal, the subsequent words, "or the ship's last port of discharge of her Europe cargo beyond the Cape of Good Hope," may be restrained to mean of the same nature, in the same course, or within the compass of that sort of voyage. As to the usage, there is direct proof that China has been mentioned when that voyage is intended. But what sticks with me is, the insured appears to have acted fairly. He had the charter-party for China so early as January, and did not make this insurance till May. There was no fraud intended, and if the premium would have been the same, the under-

sittings an action was tried upon the same policy with that in the present case of *Preston v. Greenwood*, viz. *Preston v. Hobson*, in which the plaintiff was nonsuited, because on that trial no satisfactory evidence appeared of the right or usage of the Presidencies to direct intermediate voyages, and the clauses in the charter-party to that effect did not then appear. In *Moffat v. Ward*, it appeared that the ship had unloaded all her cargo at Madras, and was afterwards lost on her way to Bengal; on which BULLER, Justice, nonsuited the plaintiff; and on a motion last Trinity Term, to set aside the nonsuit, his determination was confirmed by the Court on the ground that, by the true interpretation of the policy, the last port of discharge was not the port where she was originally destined to discharge part of her cargo, but that where she did in fact discharge it. That in this respect this policy differed materially from that in *Gregory v. Christie*, where the words were, "her loading-port."

writers were not hurt; for they would have got no more if China had been mentioned. Bengal is specified as the last port, but an alternative is given. The argument from the equality of premium is shaken by what Mr. *Thoresby* has said: but it is proper that the case should be reconsidered.

Rule absolute on payment of costs.¹

¹ The plaintiff afterwards, under a consolidation rule, elected to try the question the next time against Christie, another underwriter, party to the rule; and the trial came on before Lord MANSFIELD and a special jury on Tuesday the *14th of [*33] December, 1784. *Beacroft*, for the plaintiff, insisted, that, as the underwriters knew of the ship's destination (of which it was proved public notices in paper were delivered out at the India House to any who would apply for them), they must have understood themselves to be insuring a voyage to China, and the true way of reading the policy was, "to Madras and Bengal, or to Madras, and the ship's last port of discharge of her Europe cargo beyond the Cape of Good Hope."

Lee, for the defendant, contended that the construction must be confined to ports *ejusdem generis*; and that if the strict words of the policy were attended to, it would enable the ship to go to Madras, Bengal, and China; which, a broker proved, would make a difference of ten per cent. in the premium.

Evidence was given, for the plaintiff, of the premium being the same to Coast and Bay, and to Coast and China, where "China" was expressly mentioned.

On this evidence Lord MANSFIELD directed the jury that the words certainly extended to China; that there was strong evidence of the underwriters so understanding it, and knowing the ship's actual destination; and therefore that the plaintiff should recover: and the jury gave their verdict accordingly.

HEMMINGS v. SMITH. Nov. 18.

In an action of *crim. con.*, evidence of a marriage *de facto* and cohabitation, followed by proof of a criminal intercourse between the defendant and a woman who passed for the plaintiff's wife, is sufficient to go to a jury, without absolute proof of the former woman and the latter.

Semb. evidence of a marriage, by a person present, is sufficient, without proving expressly the reading of the service.

THIS was an action for debauching the plaintiff's wife, and getting her with child. The trial came on at the last assizes for Durham before HEATH, J., when a verdict was found for the plaintiff.

On Monday the 8th of November, Sir Thomas Davenport obtained a rule to show cause why there should not be a new trial, on these grounds: 1. That there was not sufficient proof of a marriage. 2. That if the Court should think there was sufficient proof of the fact of a marriage, yet there was no evidence to identify the person with whom the criminal conversation was proved, and to show her to be the woman who was married to the plaintiff.

This day the facts were stated by BULLER, J., from the report of Heath, J., and, as far as material to state them, appeared to be as follows:

A witness swore, that in the year 1769 he was present when the plaintiff was married in a church at Kinsale, in Ireland, to a lady of the name of Rixon: That he had seen the lady and the plaintiff frequently together before marriage: *That the marriage ceremony was performed between [*34] the hours of ten and eleven in the morning: That in the year 1777 or 1778 he saw the lady again at Cork, where she then resided: That from the time of the marriage she had always gone by the name of Mrs. Hemmings: That he had not seen her since the time of her residing at Cork; but that he had no reason to doubt that she was the same person who lately passed for the plaintiff's wife.

Several witnesses proved a criminal intercourse in the years 1782 and 1783, at Stockton, between the defendant and a person with whom the plain-

tiff had cohabited during part of that period, who passed for his wife, and went by his name. Her pregnancy and delivery corresponded with the time of such criminal intercourse, and from the circumstance of an absence of the plaintiff from England for many months, it was impossible he should be the father of the child of which she was delivered. The learned Judge left it to the jury to draw the inference from the evidence just stated, that the lady to whom the plaintiff was married in Kinsale was the same person who passed for his wife in 1782 and 1783. The first point, viz., that the actual solemnization of the marriage was not sufficiently proved, was now abandoned: the Judge's report had put an end to that question. On that motion it was stated that the witness could not speak positively to the reading the marriage-service and ceremony; but Lord MANSFIELD seemed clearly of opinion that it was not necessary to prove that circumstance with such scrupulous accuracy. BULLER, J. asked whether any evidence was given at the trial of any application made to show the supposed wife to the witness who was to prove the marriage, and it appeared that no such application was made.

Bolton, Serj., Chambre, Taylor, and Law showed cause against the rule. They argued that the two sorts of evidence produced, coupled together, raised a presumption of identity proper to be left to the jury, and sufficient to establish the fact, unless rebutted by contrary proof. The defendant might have shown that the person in question was not the same lady who had been seen by the witness in the church at Kinsale. The cohabitation of the plaintiff with that person as his wife was directly proved down to 1778; and if the person who passed as Mrs. Hemmings in 1782, and was so called by the defendant himself, was not the same, it was incumbent on the defendant to make that out in evidence. The witness *who attended the marriage- [35] ceremony in 1769 saw the wife in 1777 or 1778, and therefore, according to the defendant's case, the period of four years, from that time to 1782, is the period during which the plaintiff is to be supposed to have changed wives. The only cases on the subject are *Morris v. Miller*, B. R., E. 7 Geo. 3; 4 Burr. 2057; 1 W. Blackst. 632; where there was no proof whatever of an actual marriage: and *Birt v. Barlow*, Dougl. 170; in which it was held, that it is not necessary that the identity of the parties should be proved by the witnesses present at the solemnization of the marriage. The question is not here, whether the evidence was as satisfactory and conclusive as it might have been, but whether it was so weak, that the Judge was called upon to nonsuit the plaintiff.

Sir *Thomas Davenport* and *Wilson*, in support of the rule, contended that better proof of the identity must have been in the power of the plaintiff, and therefore he ought to have produced it. In fact there was no proof of cohabitation with the person to whom the plaintiff was married from that time downwards; and therefore it ought not to have been left to the jury to presume that the person with whom he cohabited so long afterwards as 1782 was the same.

Lord MANSFIELD.—The law is well settled as to the evidence which the plaintiff must give to prove the marriage in an action for criminal conversation. Reputation will not do for that purpose: a marriage in fact must be proved. But the identity of the person frequently does not appear to the minister who performs the ceremony, or the attesting witnesses. Therefore the identity, so as to connect the marriage in fact with the person in question in the action, may be proved by other persons or circumstances. Here the question is, whether there was any evidence of identity to be left to the jury. As to the weight of evidence, it depends on this, whether it is or is not answered. Loose evidence becomes cogent, when it is not answered. It is clear this woman passed as the plaintiff's wife at the time of the criminal

conversation. That however only proves a reputation, not an actual marriage. But then there is a witness who says, that he remembers the plaintiff and a Miss Rixon; that they were acquainted, and that they were married together *in the year 1769; that he saw them a month or two [*36] afterwards, and again in 1777 or 1778, and that she always went by the name of Mrs. Hemmings. It is true he never saw her since 1778; and it is possible she may be dead, and the plaintiff married to another person; but evidence need not be certain to every intent: Lord Coke defines certainty three ways (Co. Litt. 308, a), certainty to a common intent, a certain intent in general, and a certain intent in every particular. A certainty to every intent is not required here, and it is not the business of the Court to lean in favor of adultery. I think the evidence, though weak, was sufficient to be left to a jury.

BULLER, Justice.—The question is only whether this is evidence to go to a jury; for whether weak or strong is not the question. Put the case that he had only been a month in England, the argument is the same as it now is, after five years. Upon the point of identity there is no difference between this action and others. It is only in the proof of a marriage in fact that it differs. Suppose a person had claimed as the heir of this woman, it would be evidence to be received that she is the same. There is no difference between what is reputation in the one case, and in the other. Here it was evidence to be received; and I am not disposed to think the jury have drawn a wrong judgment. Rule discharged.

WHALE, Widow, v. BOOTH, Sheriff of KENT.¹ Nov. 19.

The goods of a testator in the possession of his executors are taken, and sold, under a *fiery facias*, on a judgment against the executor for a debt of his own, and with his consent: the property passes by such execution; notwithstanding the plaintiff in the action against the executor knew they were assets.

Smb. Otherwise, if he had known of an unsatisfied debt; and so had colluded with the executor to make a *devastavit*.

THIS was an action for a false return, which was tried at Maidstone, at the last summer assizes, before GOULD, J., when a verdict was found for the plaintiff, with £35 damages, and farther damages of £368, subject to the opinion of the Court on a case reserved.

The declaration consisted of two counts; the first stated, that the plaintiff had recovered a judgment against William Woodhams, and John Woodhams, executors of William Woodhams deceased, as well for a debt of £800, to be [*37] levied *of the goods and chattels of the testator, which were in their hands at the time of the testator's death, to be administered, as for £35 for damages, costs, and charges, to be levied of the goods and chattels of the testator, &c., if they had so much in their hands, &c.; and if not, then the damages, costs, and charges, aforesaid, be levied of the proper goods of the said executors: that upon this judgment the plaintiff had sued out a writ of *fiery facias*, directed to the sheriff of Kent, which was delivered to the defendant, being then, and until and after the return, sheriff of that county; but that, although the executors, before the return of the writ, had goods and chattels of the testator's and also of their own, within the defendant's bailiwick, he did not seize the same, nor cause to be made thereof the said debt, damages, &c.; but returned *nulla bona* both as to the goods of the testator, &c., and as to the proper goods of the executors.

The second count corresponded with the first, except that it stated that the defendant had seized certain goods which were of the testator, and also certain goods which were of the executors, to the value of the debt and damages respectively.

The plea to both the counts was, not guilty.

The special case was to the following effect:

The testator at time of his death was indebted to the plaintiff by bond in the penal sum of £800, conditioned for the payment of £400 and interest. He died about three years before the trial, leaving his two sons William and John his executors; who on his death did, as his executors, possess themselves of the stock of a farm, which had been occupied by him, and other personal effects, to a greater amount than the money due on the bond. The plaintiff brought an action on the bond against the executors, and obtained judgment in Easter Term, 24 G. 3, for £800 and £35, to be levied as stated in the declaration. A writ of *fiery facias* being sued out upon this judgment, the defendant, as sheriff of Kent (to whom the writ was directed), returned *nulla bona*, both as to the effects of the testator and those of the executors. The executors were indebted on their own private account to an uncle in £250, secured by two bonds, and in £460, secured by several promissory notes; the whole of such debt to the uncle amounting, inclusive of interest, to £855. To secure this sum, the executors confessed a judgment for £1712, and on the 16th of February, 1783, *judgment was signed, and on the 17th of the same month a writ of *fiery facias* issued to the then sheriff of Kent, endorsed to levy £860 10s., by virtue whereof he, on the 25th of the same month, seized certain goods of the testator, which had remained on his farm since the time of his death. An inventory of those goods was made by the sheriff, and being valued at £559, in consideration of that sum he executed a bill of sale to one Hore, as trustee for the uncle, who knew that some of the goods were parcel of the estate and effects of the testator.

One Mansfield was put into possession under the bill of sale in March, 1783, and one of the executors came with his family to reside on the farm, as servant to the uncle. When the plaintiff issued out her writ of *fiery facias*, the defendant's bailiff again seized the goods on the farm; but the undersheriff, apprehending the property was devested by the bill of sale, returned *nulla bona*.

The question stated for the opinion of the Court was, whether the executors had so far conveyed away the goods of the testator as to deprive the plaintiff of her claim to levy thereon the said sum of £368.

The case was this day argued by *George Bond* for the plaintiff, and *Garrow* for the defendant.

Bond.—The question in this case properly is, whether, under the circumstances stated, the return is true in point of law. In the first place, the sheriff acts at his peril; and where he is doubtful as to the property, he may summon a jury to ascertain to whom the goods belong. "The safest and surest method," says Dalton, "for the sheriff or officer is, to inquire, by a jury, in whom the property of the goods is; or else not to take in execution, or not to meddle at all with any such goods as shall not plainly appear to them to be the proper goods of the defendant; for it seemeth that the officer is bound at his peril to take knowledge whose the goods be; or at least that they be the proper goods of the defendant; but being found by the jury, that excuseth the sheriff." Or, because such an inquiry by a jury may be attended with difficulties, he may apply to the Court, who upon such appli-

¹ Dalt. p. 146. This is no protection to the sheriff; but is merely to govern his discretion; per Lord ELLENBOROUGH, C. J., *Payne v. Drew*, 4 East, 581.

[*39] cation will interpose to protect and assist him, *in the case of concurrent claims of property. This is laid down in *Shaw v. Tunbridge*, in *Blackstone's Reports*.¹ If he does not, the general practice warrants the presumption that he is indemnified, *Semple v. Lord Newhaven*, B. R., M. 24 G. 3. And therefore it is no hardship upon him, if he is made liable to the plaintiff, when he mistakes the owner of the goods. Particularly in actions against an executor, the sheriff ought to be cautious in returning *nulla bona*.

Upon an issue on the plea of *plene administravit*, if a verdict is found for the plaintiff, and there is a judgment and a writ of *feri facias*, the Court will not permit the sheriff to make that return; but he must either levy the debt, or return a *devastavit*. *Woodward v. Chichester*, C. B., T. 2 Eliz. Dyer, 185, b, as cited in Wentw Office of Executor, 168.

If the defendant, therefore, in the present case, has committed a mistake with regard to the property of the goods, it is his own fault, and he must answer for it. The property in question was not devested by the first judgment, which was confessed by the executors for a private debt of their own. The exigency of the writ founded on that judgment was, to levy the debt on their goods. Under that authority the sheriff had no power to seize goods in their hands, as executors. The case of *Ridler v. Punter* is in point on this head. Upon a special verdict in ejectment, it appeared, that A. and his wife were possessed, in right of the wife, of a term which she held as administratrix to her first husband; that A., being indebted by contract, conveyed the term to B., to the use of A. and his wife for their lives, and afterwards to the use of B.; that A. being sued for the debt, and a judgment recovered against him, a writ of *feri facias* issued, under which the sheriff took the term, and sold it to the plaintiff; and the question was whether the sale was

[*40] *good. The Court held it was not: "for the term being in right of the wife, as administratrix, even if it had continued in the hand of A., and had never been granted, it would not have been extendible for the debt of A., and if he had had it himself as executor, it would not have been extendible for his proper debt, B. R., H. 35 El. Cro. El. 291." This case only confirms the doctrine laid down by the Court in that of *Bransby v. Grantham*, which happened several years before, and is reported by *Plowden*, B. R., E. 20 El. Plowd. 525; for there it is expressly held, that where the executor of an executor is, as such, possessed of a term which belongs to the estate of the first testator, such term shall not be put in execution for the debt of the second testator. Those two solemn and concurrent authorities are not contradicted by any subsequent determination, and they are supported by the rules and principles which run through all the analogous cases. Thus it is laid down by Lord MANSFIELD, in the case of *Howard v. Jemmett*, that if an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even money, when it can be specifically distinguished, and ascertained to have belonged to the testator, and not to the bankrupt himself, 3 Burr. 1368-9; B. R., 3 G. 3: and the reason is stated in *Gilbert's Cases in Law and Equity*, viz. because the testator's property is appropriated to pay the testator's debts, *Myles v. Williams*, B. R., 12 Ann.; *Gilbert*, Mod. Ca. 318, 321, 323.

In like manner if a man is convict, or attainted of felony or treason, or

¹ C. B., E. 16, 3, 2 W. Blackst. 1064. Vide also *Cooper v. Chitty*, B. R., M. 30 G. 2; 1 Burr. 20, 37; 1 W. Blackst. 65, 70; and *Aldridge and Another v. Ireland*, B. R., E. 24 G. 3. MSS Where Lord MANSFIELD said, he should always consider the sheriff (?) and the party as the same. That it is in all cases the sheriff's own fault if he is not indemnified; for that the Court will never force him to pay over without an indemnity. Acc. per LAWRENCE, J., in *Payne v. Drew*, 4 East, 535; but where a sheriff takes upon himself to act without an application to the Court, and makes his return, he must be bound by his own act. Ibid.

outlawed in debt, he does not forfeit the goods which he has, as executor.¹ If property had been acquired by a villain, his lord might seize it, Littl. Villenage, § 177; but that right of the lord did not extend to what came to the villain as executor. On the contrary, if the lord had seized goods which belonged to the villain's testator, the villain might have maintained an action against him, and would have recovered damages, Ibid. § 192. And the reason for those decisions appears in Pinchon's case, B. R., M. 9 Jac. 1, 9 Co. 86, b, cited in Wentw. Off. of Exec. 88, 89, where it is said that executors who have the goods of *their testator, in another right, viz. to pay the debts, &c., of the testator, shall not convert them to their [*41] private use, without paying the just and true debts of the testator; for that would be against justice and right, and against the office of executors, who are but ministers and dispensers of the goods of the dead, Ibid. 88, b. If the executors had brought an action of trespass against the sheriff, for taking the goods in question under the execution against themselves for their private debt, the sheriff could not have justified the taking. This I contend, not on any express decision, but from the consideration of the ancient form of proceeding by executors in such an action. The form of the writ is to be found in Fitzherbert, F. N. B., new ed. 198; old ed. 87. "If A. and B., executors of the testament of C., shall make you secure, &c., then put, &c.; wherefore he took and carried away four oxen, &c., which were his, the said C.'s, of the price of, &c., found in the custody of them, the said executors, at D., and other enormities, &c., to the delaying of the execution of the will aforesaid," &c. This special conclusion to the writ is no longer used; but it shows what the law is; and upon an action for returning *nulla bona* to such a writ, the *fieri facias* against the goods of the executors would be no defence. I do not deny that an executor has the power to dispose of the goods of his testator. But had there been any alienation by the executors in this case? I say there had not. A judgment confessed is no alienation. At common law the property was in no case bound till the *teste* of the writ, and now, by the statute of frauds, 29 C. 2, c. 3, § 16, not till the time when it is delivered to the sheriff. Here it is not enough to say that the executors have been guilty of a *devastavit*. The seizure by the sheriff was improper and void. I know of no instance but that of a distress for rent, and some cases of prerogative process out of the Court of Exchequer, where the property of one man may be seized for the debt of another.² Suppose this had been the case of churchwardens, instead of executors; upon an action against them, would the seizure of the church Bible or the communion plate have *been legal? Or could the sheriff have defended himself, under a [*42] *fieri facias* for their private debt, against a demand at the suit of the parish?

Garrow, contra.—Enough has been admitted for the defendant's purpose, in the close of the argument on the other side: for it is agreed that an executor has the unqualified power of aliening the goods of his testator. [Lord MANSFIELD here asked, if the counsel knew any stronger instance of the power of an executor to alien than that of *Mead v. Lord Orrery* and others, before Lord HARDWICKE, 3 Atk. 285; Canc. 19th July, 1745.] The point has grown into a principle, and is stated as such in all the general writers and

¹ Wentw. Off. of Exec. 88, who cites 24 Ed. 3, f. 25; but I find nothing on the point in that part of the year books. Many of the references in the last edition of that book (1744) are wrong. (Doug.)

² The case of goods of another person, left by the consent of the true owners in the possession of a trader, who becomes bankrupt, and which by 21 J. 1, c. 19, § 10 and 11, the commissioners are authorized to sell for the benefit of the creditors, is another instance. (Doug.)

books of institutes. The single question is whether a *bond fide* creditor, who has obtained judgment and execution for a fair debt, personally due by an executor, under which execution there has been a sale by the sheriff, shall have the property of the goods overhauled by a creditor of the testator. [Lord MANSFIELD.—There is a case in Equity Cases abridged, where an executor having sold for a valuable consideration a leasehold estate of his testator to A., who had notice of a bond debt then outstanding against the testator, a bill was filed by the bond creditor against the executor and A., for a satisfaction out of the leasehold estate; and the question being, whether the sale was good to bind the bond creditor, it was decreed for the plaintiff, first at the Rolls, and afterwards by the Chancellor on an appeal, the Chancellor saying, the defendant was a party, and consenting to, and contriving, a *devastavit*].¹—There was a collusion and fraud there; but this case admits that the transaction was fair. If it had been fraudulent, the jury ought to have found a general verdict for the plaintiff. Besides if an unfair and collusive advantage had been intended, the parties would have sold the goods, and turned them into money, which could not have been traced. I agree that a judgment does not devast the property; but execution executed does. The case of *Smallcomb v. Cross*, and others, Sheriffs of London, is very strong to this point. A. and B. had both recovered judgments against C. Each sued out a writ of *fiери facias*; that of A. bore *teste* before that of B., but B.'s [*43] was delivered to the sheriffs at nine o'clock in the morning, and A.'s not till ten of the same day. B. would not take a warrant from the sheriffs to levy the debt, but had his writ endorsed according to the statute of frauds.* A. took a warrant, and seized the goods in execution, and the sheriffs sold them to Smallcomb. Afterwards they seized them again under B.'s writ, and sold them to Cross. Upon this, Smallcomb brought trover against Cross and the sheriffs. The cause was tried before Lord HOLT, and was afterwards solemnly argued in court, when it was unanimously held, that where two writs of execution are delivered to the sheriff on the same day, he has not an election to execute which he pleases, but must execute that which is first delivered; but if in fact he levies goods by virtue of the writ last delivered, and sells them (whether such writ was delivered on the same or a subsequent day), the property of the goods is bound by the sale; the party cannot seize them by virtue of the writ first delivered; although he may have his remedy against the sheriff. For the Court said, sales made by the sheriff ought not to be defeated; because, if they are, no man will buy goods levied upon a writ of execution. Under the circumstances of that case it was held, that the plaintiff had no remedy against the sheriff, because B. would not take a warrant to levy on the goods, but seemed to have a design only to keep the writ in his pocket to protect C.'s goods by fraud. 1 Lord Raym. 251; B. R., M. 9 Will. 3; S. C., 1 Salk. 320, and 5 Mod. 376. If the executors had ever made a voluntary, not a compulsive sale, of their testator's effects, and had paid a debt of their own with the money, nobody could have questioned the validity of the sale. It is the duty of an executor not to pay money due upon an usurious contract; and if he does, he is guilty of a *devastavit*: but a creditor of the testator cannot recover back the assets. So if he submits a debt due to the testator to arbitration, and an award is made, allowing much less than was really due, a creditor cannot overhaul the transaction. So if a debt is released by one of several executors, that shall bind them. In the present case the sale must stand, though the executors may be liable to the

¹ *Crane v. Drake*, M. 1708; 1 Eq. Ca. 240, pl. 29; 2 Vern. 616. N. B. This is the third vol. of the 8vo. edition, 1806.

² 29 Car. 3, c. 8, § 16, which requires the officer receiving the writ to endorse, on the back thereof, the day of the month, and year whereon he received it.

plaintiff for a *devastavit*. If the executor *himself had sold the goods, no question could have been made; for if the law were otherwise, nobody could ever venture to buy of an executor. But the sale by the sheriff, an officer of the law, is equally binding; and it must be observed that the execution and sale were prior, not only to the plaintiff's execution, but to her judgment. As to the old authorities which have been cited on the other side, they relate to the question between executors and sheriffs; and there is no doubt that, if a sheriff will take the testator's goods under a writ of execution for the private debt of the executor, the validity of the execution may be litigated with the sheriff by the executor. But there are no cases where a creditor of the testator has been permitted to question such a seizure and sale by the sheriff, when the executor has acquiesced. I admit the law to be as has been cited from the case of *Howard v. Jemmett*, supra, p. 40; but that is upon the principle that the assignees have no better right than the bankrupt himself had; and supposes the property to have continued in specie; but if there were conversion and sale by a bankrupt of his testator's goods before his bankruptcy, the money would vest in the assignees. The answer to the case cited from *Plowden*, supra, p. 40 is, that the trusteeship of an executor in the effects of his testator ceases with life, and therefore he cannot devise those effects; because his will does not take place till his death: and the direct question in that case was, whether the devise of a term of a testator's by the executor was good. But the case of *Nugent v. Giffard* and others, 1 Atk. 463; Canc. M. 1737, is exactly in point in favor of the defendant; there being no other difference between that and the present case, except that there the sale or assignment was private, here it was public, under judicial process. That was a bill filed against trustees, to compel the assignment of a mortgage term to the plaintiff. The mortgage in question was vested in those trustees in trust for A. A. died, and appointed B. his executor, who made an equitable assignment of the mortgage term to the plaintiff, as a satisfaction for a private debt owing by B. to the plaintiff. Lord HARDWICKE stated the question to be, whether the creditors of the testator could follow the term in the hands of the plaintiff, *as specific assets; and he held that they could not, but that the plaintiff was entitled to the benefit of the assignment. He said, at law the executor has a power to dispose of and alien the assets of the testator; and when they are aliened, no creditor, at law, can follow them; for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no lien upon the assets. A court of equity will indeed follow assets upon voluntary alienations, by collusion of the executor; but if the alienation is for a valuable consideration, unless fraud be proved, a court of equity suffers it as well as a court of law, and will not control it. For a purchaser from an executor has no power of knowing the debts of the testator; and if equity, upon the appearance of such debts afterwards, would control such purchasers, nobody would venture to deal with executors. It is not a sufficient objection that the plaintiff took the assignment with notice, that it was the testamentary assets of the testator; for if that were to prevail, it would affect every purchaser from an executor, because every such purchaser must have that notice. [*41] [*45]

Bond, in reply.—I admit that the debt of the executors was a fair *bond fide* debt, but not that the seizure for that debt was fair. Nothing is found on that head in the case, one way or the other. A special case certainly resembles a special verdict; no presumption is to be raised in either instance: but if presumption were competent, there is the strongest ground here to presume collusion. The cases cited for the defendant all go upon alienation by the executor; but that differs from an execution against him. It is no

answer to say, that the plaintiff may sue the executors for a *devastavit*; for she has a right to insist upon a satisfaction out of the testator's goods. In the case of *Smallcomb v. Cross*, there was no question similar to the present. The goods there were liable to both debts. Where an executor pays money upon an usurious contract, it is an alienation. As to the danger to purchasers from a sheriff, that goes to every case, where goods, not belonging to the defendant in the writ, are seized; and therefore that argument proves too much. *Caveat emptor*, is the old rule; and this is one of the cases where that rule is applicable. In *Nugent v. Giffard* there was an alienation; [*46] and no case can *be cited, where an execution has been held to be equivalent to an alienation.

LORD MANSFIELD.—The general rule of law and equity is very clearly settled, that an executor may dispose of his testator's assets; and that they cannot be followed by any creditor whatever. A creditor has no lien upon them. It would be monstrous if the law were otherwise; for no one would deal with an executor (whose duty in general it is to sell) without taking an account of the whole estate of the testator. It is clear that an executor may alien; and it is also clear that when an executor aliens his testator's assets, the purchaser must know them to be assets for the payment of his debts. That is no objection. It is no evidence of fraud: for the testator's debts may have all been satisfied. Or, if not, must the purchaser look to the application of the money? It is clear the executors may alien them for a debt of his own, either absolutely or conditionally, as a security. There is only one qualification and exception, viz.: where there is an express contrivance and collusion with the executor to commit a *devastavit*. Here the question is, whether the execution falls within the general principle. The testator had been dead three years, and no claim made by the plaintiff. She lies by all that time. If the debts had been paid, the goods are the property of the executors. They used them as their own. A stranger cannot tell whether the debts have, or have not, been paid. Then a bond creditor of the executors takes out execution against them, before anything is done by the plaintiff. It is true the executors might have disputed the seizure with the sheriff; but they did not: they consented to the execution and sale; and the case cannot be distinguished from an alienation by an executor. The bill of sale, acquiesced in by the executors, is the same thing as a direct sale by them. As to the fraud, there is none. It is stated that the bond creditor knew that some of the goods were the testator's; but not that he knew there were any debts unpaid. It has been very properly admitted, that we are not to raise any presumption; though the rule is not so strict, as in the case of a special verdict.

WILLES and ASHURST, Justices, were of the same opinion.

[*47] BULLER, J.—*Nugent v. Giffard* is more applicable than *the counsel for the plaintiff are willing to allow. Lord HARDWICKE was clear that the assignment was good at law; and only inquired whether there was any fraud. I have no doubt that the sale by the sheriff in this case, being acquiesced in by the executors, is equivalent to an assignment by them.

Judgment for the plaintiff as to the £35; and for the defendant as to the rest.¹

¹ In *Farr v. Newman*, 4 T. R. 621, it was decided by the Court of K. B. (*dissentiente* BULLER, J.) that where the writ at the suit of the testator's creditor comes in before execution executed, under the writ at the suit of the executor's creditor, and the sheriff has notice that the goods taken are the testator's goods, he is bound to levy under the writ at the suit of the testator's creditor. In that case the whole law on this subject is fully discussed; and the decision of Lord MANSFIELD in this case much canvassed: but it is shown by ASHURST, J., in his judgment, p. 645, that the decision of the Court there by no means interferes with the authority of the present

case; the difference being, that in the present case the bill of sale was made and completed, under the execution, at the suit of the executor's creditors, before the coming in of the plaintiff's execution for a debt of the testator's. Lord KENYON also expresses his assent to the doctrine here delivered by Lord MANFIELD. There is a statement of this case, and of the judgment of the Court, in a note to *Farr v. Newman*, p. 625. The doctrine upon which the principal case is distinguished from *Farr v. Newman*, is confirmed by the decision of the Court of K. B., in *Payne v. Drew*, 4 East, 523, where it was held, that the property in goods taken in execution is not altered till the sale. Many other points on this subject are there also considered. Lord ELDON, also, in the case of *M'Leod v. Drummond*, 17 Ves. 168, expresses his satisfaction at the decision of *Farr v. Newman*.

In *Quick v. Staines*, 1 B. & P. 298, the principal case is alluded to by the Court with approbation: and it was there held, in conformity with this case, that an executrix having treated goods as her own, and, after a subsequent marriage, as the goods of her husband, could not object to their being taken in execution for the husband's debt.

"In equity, it seems to be now established (in contradiction, as it should appear, to some former decided cases), that the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of, his own debt, on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty." Williams on the Law of Executors. Mr. Williams cites *Bouney v. Ridgard*, 1 Cox, 146-148; *Scott v. *Tyler*, 2 Dick, 712, 724, S. C., 2 Bro. C. L. 431; *Hill v. Simpson*, 7 Ves. 142; *Andrew v. Wrigley*, 4 Bro. C. L. 186; Lord ALVANLEY's judgment, *M'Leod v. Drummond*, 17 Ves. 164-170; Lord ELDON's judgment, *Kean v. Robarts*, 4 Madd. 857; Sir J. LEACH's judgment. See also *Crane v. Drake*, 4 Vern. 616, S. C. 18 Vin. Abrid. 121; *Pagett v. Hashins*, Prec. Chanc. 481; *Gilb. Eq. Rep.* 111.

BELL and Others, Assignees of BRUCE, a Bankrupt, v. AULDJO.
Nov. 19.

An insurance broker has no implied authority to pay to the assured losses, either total or partial, for the underwriter who employs him.

THIS cause came on to be tried at Guildhall, at the sittings after last Trinity Term, before BULLER, J.—The jury found a verdict for the plaintiff, subject to the opinion of the Court on a case reserved.

The declaration was in assumpsit, and stated, that the defendant was indebted to Bruce, before he became a bankrupt, in £200, for premiums of assurance due on divers sums of money, before that time subscribed by Bruce, on divers policies of assurance, as an underwriter and assurer to the defendant. There were also other common counts in assumpsit. The defendant pleaded the general issue.

The facts stated in the special case were as follows: Bruce underwrote a policy of assurance on goods, the property of James Davidson, on board the *Juno*, from London to Halifax, on the 29th of October, 1782. The *Juno* was captured, retaken, and carried into Jersey to be repaired, and on the third of January, 1783, Bruce, and other underwriters, signed the following memorandum: "We, the underwriters on this policy, do authorize Mr. Thomas Mackrell to send over a person to Jersey to take care of the ship and cargo on our account, and to cause the ship to be repaired, and to proceed to London, and to insure to the amount of our interest; and we do agree to settle £40 per cent. on account of this interest. The person to draw on Thomas Slop what expenses he may be at, by signing the following adjustment and memorandum:

"Agreed to pay £40 per cent. on account.

'London, 3d January, 1783.—R. B.'

"Copy of the declaration on the *Juno's* policy enclosed.
R. B."

[*49] *The defendant, by the direction of Davidson, gave credit to Davidson on the 7th of January, 1788, and Davidson made the defendant debtor to him, for the said £40 per cent. in their books; and about six weeks afterwards a receipt was given from Davidson for the said £40 per cent. But the name of Bruce remained on the policy, adjustment, and memorandum at the time of the bankruptcy, and was still thereon at the time of the trial. Bruce became a bankrupt on the 3d of May, 1788.

Baldwin, for the plaintiffs, began by contending, that the defendant (who it seems was an insurance-broker) could not in this case avail himself of the payment of the money to Davidson (supposing him by law entitled so to do), because he had not pleaded, or given notice of a set-off.

Wilson, for the defendant, insisted that in this action it might be given in evidence on the general issue, without a notice.

WILLES, *ASHURST*, and *BULLER*, Justices, seemed to think that it could not be given in evidence; but Lord *MANSFIELD* saying, that as the plaintiffs had not made the objection at the trial, they would not allow it to be taken now; and *Baldwin*, waving that objection, considered the case as if a set-off had been pleaded.*

Baldwin then said, that this was not a new question; for that the very same point (viz. that an insurance-broker, as such, has no implied authority to act for the underwriter, and pay the loss for him) had been determined very lately in this court in the case of *Wilson v. Crichton*, B. R., M. 23 G. 3, ante, vol. iii. The answer there was the same which the plaintiff gives here, viz., that the credit for the loss is given by the insured to the insurer, and not to the broker. The only distinction between the two cases is, that there the losses were total; here it is an average loss; and that can make no difference in the principle: the bankrupt's name still remains in this case on [*50] the policy and in the adjustment: therefore he, or his assignees, who stand in his place, still continue liable to the insured. The defendant had no express authority from Bruce to pay for him; and, no such authority being implied, it follows that the defendant is not entitled to set-off the adjusted loss against the present demand.

Wilson, on the other side, contended, that the broker is an agent on both sides. Besides, the question whether the defendant had an authority from Bruce to pay the money over to Davidson seems to have been a proper subject for the consideration of a jury. [*BULLER*, J.—“This case was in fact twice tried; for it was called on one day in the absence of the defendant, and was tried again the next day by consent; and on neither occasion was it contended that this was a question for the jury.”] When no time is fixed by the express terms of the contract for the payment of the loss by the underwriter, it is payable immediately upon the adjustment. The broker is then entitled to receive it from the underwriter, and to pay it to the insured. It seems to be admitted that if the defendant had struck Bruce's name out of the adjustment and policy when he gave Davidson credit, it would then have been a payment for Bruce, and a discharge to him from Davidson. The striking out the name in such cases has the same effect as the cancelling or destroying a note or bond. That cannot be done with policies, because there are generally a great many different underwriters on the same instrument. But a receipt has the same effect as the cancelling an instrument by which

*In *Whitehead v. Vaughan*, T. 25, 8, it was held that in actions by assignees of a bankrupt the defendant may set-off, under 5 Geo. 2, c. 80, s. 28, without pleading it or giving notice. There is a report of this case in *Cooke, Bankr. Law*, 579. It is cited also in *Cullen*, 218, 214, for a different point, viz., that a broker has a lien on policies for a general balance.

*That such a plea of set-off would be good, see *Ridout v. Brough*, Cowp. 188, which overruled *Ryal v. Larkin*, 1 Wils. 156.

the debt is secured ; and it is stated that Davidson gave a receipt for the £40 per cent. That therefore was a complete discharge as to a loss of £40 per cent. on the whole sum insured. And it was the only sort of discharge practicable here ; for the name could not have been struck out of the policy, because it was not a final settlement. The insured had still a demand against Bruce for what he could have proved to have been lost beyond the £40 per cent. In *Wilson v. Crichton* there was no reason why the name might not have been struck out of the policy, because there was an end of the whole transaction. A receipt would have done there ; but there could be nothing else here. This, therefore, was a payment by Bruce. He never was called upon by Davidson, and therefore will be presumed to have known that Auldjo had paid him : a payment in the course of trade, *when there was no insolvency ; for the bankruptcy did not happen till four [*51] months afterwards. It would be extremely hard indeed if Davidson should have this money to refund to Auldjo, and be forced to rest satisfied with a dividend under Bruce's commission.

Baldwin, in reply.—There is nothing in this case to warrant any presumption that Bruce knew of the transaction between Auldjo and Davidson. It does not appear that the money was to be payable immediately upon the adjustment. That was on the 3d of January ; and no longer afterwards than the 7th, Auldjo takes upon himself, without any communication with Bruce, voluntarily to transfer the credit to Davidson. The receipt was not taken till six weeks afterwards. A general authority to insurance-brokers to pay would be extremely dangerous. If an underwriter became insolvent, a broker, foreseeing the bankruptcy, might go and pay all his friends, and then set-off those payments against the demands upon him for premiums.

LORD MANSFIELD.—The decision cited is very much in point. There is no special authority, nor any general usage, stated in the case ; and we cannot presume such an usage. It was an officious payment. As to the striking out the name, there is a difference between striking it out of the policy, and out of the adjustment.

WILLES, J.—It seems to me that this payment was made by the defendant in the common course of trade. There is a material difference between this case and *Wilson v. Crichton*, as the losses were total in that case.

ASHURST, J.—I think we cannot take notice of a supposed usage for brokers to pay, which is contrary to common law, unless it had been stated in the case.

BULLER, J.—It is pretty clear that one point decided in *Wilson v. Crichton* was, that brokers have no general authority to pay. If that is so, then there is no particular authority proved here. To bind one man by a payment made by another, there must either be a request before, or an assent after, the payment. Otherwise no man behind my back can make me his debtor.

Postea to the plaintiffs.

*BRADDYLL v. JONES. Nov. 19.

[*52]

If goods are distrained for rent, and replevied by the tenant, and afterwards (the tenant becoming a bankrupt) they are sold by the assignees, the landlord succeeding in the action of replevin, and obtaining a *retorno habendo*, cannot recover the amount of the rent against the assignees in an action for money had and received.

THIS was an action for money had and received, in which a verdict was obtained for the plaintiff, damages £97 10s., subject to the opinion of the Court on the following case :

The plaintiff was landlord of certain premises occupied by one Samuel Bradbury, at the rent of £78 a year. On the 23th day of June, 1780, the plaintiff distrained the goods of Bradbury for £97 10s., rent due at Midsummer, 1780. Bradbury replevied the goods by giving the usual replevin bond with two sureties, and the goods were redelivered to him. On the 24th day of October, 1780, Bradbury became a bankrupt. The defendant, Jones, and one John Ball were chosen assignees; and, as such, on the 22d day of November, 1780, sold the goods distrained, and all the other goods of the bankrupt, and received the money, which was more than sufficient to pay the £97 10s. due to the plaintiff. On the 28th day of November, 1781, John Ball became a bankrupt, and the defendants Heathfield and Jefferies were chosen his assignees. In Michaelmas Term, 1780, the plaint on the replevin was removed from the Sheriff's Court into the Common Pleas; and the present plaintiff, Braddyll, obtained judgment thereon in Hilary Term following; and in the same term sued out a writ of *retorno habendo*, returnable the first return of Easter Term: on which the sheriffs returned, that the goods were eloiigned.

The question for the opinion of the Court was whether the plaintiff was entitled to recover.

This case first came on before the Court on Tuesday the 11th of May, E. 24 G. 3, in an action, as above described, in which Jones, Heathfield, and Jefferies were defendants; when Stebbing, counsel for the plaintiff, was interrupted by BULLER, J., asking him how the action could be maintained jointly against all the defendants; one being an assignee of the bankrupt, and the other two assignees of the other assignee, who had become a bankrupt since the cause of action accrued. It was suggested in answer, that the action was so brought by the direction of a court of equity; but, on further inquiry, it did not appear to be exactly so. And the Court being clear that [*53] the action so brought could *not be supported, judgment of nonsuit was given, that the plaintiff might bring another action.

This was afterwards done, and Jones was alone made defendant; and a similar verdict having been obtained, the case now came on to be argued on a special case, similar in every respect, except the statement of the parties who were made defendants.

Stebbing, for the plaintiff.—This is a question between landlord and tenant. In *ex parte* Plummer, 1 Atk. 103, it was held, that landlords are so far excepted from the operation of the bankrupt laws, that they may distrain for rent, even after assignment and sale, if the goods are not removed, although the rent distrained for be more than one year's rent, the case not being within the statute 8 Ann. c. 14, s. 1, which gives a year's rent on executions. The case *ex parte* Descharmes, *ibid.*, shows that, if the landlord lies by till after the goods are sold and removed from the premises, and then applies to a court of equity for relief, he comes too late, having lost his remedy by distress; and can only come in *pro rata*, as a common creditor. Here the assignees have exceeded their authority. And the plaintiff has been guilty of no laches. The assignees can have no better right than the bankrupt; and they are liable to all equities which affect him. *Walker v. Burrows*, 1 Atk. 93; *Stracy v. Hulse*, Dougl. 411; *Peters v. Soame*, 2 Vern. 428. The case of *Mace v. Cadell*, Cowp. 232, has settled the true construction of the statute 21 Jac. 1, c. 19, s. 11, that it does not extend to vest in the assignees all goods in a bankrupt's possession, but only those which he has power to sell as his own. I contend here that the tenant could not dispose of these goods after the distress. The lien of the landlord by the distress is confined to particular goods. After that they are in the custody of the law, and these goods were replevied before the bankruptcy. The assignees in this case must be

considered trustees for the landlord. Suppose the goods were not the property of the tenant (in which case they might equally have been taken by distress), the assignees could not have sold them. If it be said that the form of action is mistaken, I contend that the money may be recovered by the plaintiff in an action for money had and received, under the doctrine of the case of *Moses v. Macfarlane*, 2 Burr. 1005, as being money got through an undue advantage taken of the plaintiff's situation.

**Morgan*, for the defendant.—This is quite a new action: there is no case which is any way similar. The argument for the plaintiff [*54] goes to establish a lien on the goods, in whatever hands they may be found, and would extend to make all goods under such circumstances inalienable. I admit that the landlord may distrain after bankruptcy and assignment; but he cannot follow the goods if removed.

In replevin the landlord obtains three personal sureties. If they are insufficient, the sheriff is liable to him for the insufficiency of the security. Besides, he may prove his debt under the commission, so that there is not much hardship or inconvenience upon the landlord.

Lord MANSFIELD (stopping *Morgan*).—The case has happened many thousand times; and it would be quite new to support this action.

ASHURST, J.—The law seems to consider the replevin-bond as the only security to the landlord. If he prevails, he cannot, on a *retorno habendo*, have the goods otherwise than as a pledge. Therefore he cannot be entitled to recover, as in this action, the money for which they are sold.

Postea to the defendant.

WADHAM v. MARLOW.¹ Nov. 20.

1. A common assignment by a lessee, without acceptance of rent from the assignee by the lessor, or some other evidence of his assent, is not sufficient (though the lessor have notice) to discharge the lessee from an action of debt.
- But, 2, an assignment under a commission of bankruptcy being by act of law, and under the statutes of bankruptcy, is a good plea in discharge of the bankrupt lessee in an action of debt for rent. See 6 Geo. 4, c. 16, s. 75.

IN debt for rent, the plaintiff declared, that by indenture bearing date the 1st of January, 1777, between the plaintiff of the one part and the defendant of the other, the plaintiff, in consideration of the yearly rent and covenants therein reserved and contained, and on the part of the defendant, his executors, administrators, and assigns, to be paid and performed, demised to the defendant, his executors, administrators, and assigns, certain premises, in the said indenture mentioned, to have and to hold the same unto the defendant, his executors, administrators, and assigns, from Christmas which was in the year 1775, for the term of seven years, *yielding and paying therefor, [*55] yearly and every year, during the said term, the yearly rent of £75, at the usual days of quarterly payments; that the defendant, on the said 1st of January 1777, by virtue of the said indenture, entered upon the demised premises, and continued possessed thereof till the expiration of the term on Christmas day, 1782. The plaintiff then averred, that the rent for one year and a half was in arrear, on Christmas day 1782, and still continued due, whereby an action had accrued to him to recover the same of the defendant.

The defendant pleaded, 1. *Non est factum*; 2. As to one quarter's rent due at Michaelmas, 1781, that, after the execution of the lease, and before the commencement of the action, to wit, on the 15th of December, 1781, he became a bankrupt, within the intent and meaning of the several statutes

¹ S. C., 1 H. Bl. 488 n., 2 Chitty's Rep. 600.

made and in force concerning bankrupts; and that the said quarter's rent became due before the time when he so became a bankrupt, and of this he put himself on the country; and as to the residue of the sum demanded, that the plaintiff ought not to maintain his action thereof; because he (the defendant) being a subject of this kingdom, on the 26th of July, 1781, and for a long time, to wit, three years and upwards, was a grocer, dealer, and chapman, &c., and that, after the demise by the plaintiff to him, and before the said residue of the sum demanded became due, to wit, on the said 26th of July, 1781, he became a bankrupt. The plea then went on to state in detail all the formal proceedings relative to a commission of bankruptcy sued out against the defendant, bearing date the 17th of December, 1781, and particularly the common assignment by the commissioners.—That, by virtue of the premises, the assignee, before the said residue became due, entered into the said demised premises, and was possessed thereof till the end of the term, of all which the plaintiff had notice. Then the subsequent proceedings, viz., the bankrupt's last examination, and the execution and allowance of his certificate, previous to the commencement of the action, were stated, and the plea concluded with a verification.

The plaintiff replied, to that part of the special plea concerning the quarter's rent therein mentioned, and which became due at Michaelmas, 1781, that he would not further prosecute the defendant for the same, and demurred [56] generally *as to the other part, respecting the residue of the demand which became due after the bankruptcy.

This case came on for argument, the first time, in last Trinity Term, on Tuesday, the 22d of June, when *Baldwin* was heard for the plaintiff, and the court gave judgment against him, without hearing *S. Heywood*, who was to have argued on the other side.

Afterwards, on the last day of that term, *Baldwin* mentioned some cases he had found since the argument, which he said were in favor of the plaintiff; upon which the Court ordered the cause to be restored to the paper, and to stand over for a second argument.

On Tuesday, the 16th of November, *Bearcroft* argued for the plaintiff, and *S. Heywood* for the defendant.

The argument on the part of the plaintiff was to the following effect:

On the former occasion, when this demurrer came before the Court, the case of *Marsh v. Brace*, B. R., H. 11 Jac. 1, Cro. Jac. 334, was referred to as an authority against the plaintiff; but the facts of that case went a great deal farther than the present. It is true it was, like this, an action of debt, not of covenant; but it was there expressly shown in the plea, that the plaintiff, after the assignment, had accepted rent from the assignee. When that is done, a privity is established between the assignee and the landlord; the assignee becomes the landlord's tenant, and the original lessee is discharged. But here it is not alleged in the plea that there has been any acceptance of rent by the plaintiff from the assignee of the defendant. When a lessee assigns his term, the lessor has two strings to his bow: he may either continue to call upon the original lessee in the respect of the privity of contract, or on the assignee in respect of the privity of estate. But if he calls on the assignee, he relinquishes his right of proceeding against the original lessee. The first material case on this subject is that of *Walker v. Harris*.¹ That was an action of debt brought against an original lessee for rent in arrear after an assignment. The case was solemnly argued, and the Court unanimously held, that the action lay, notwithstanding the assignment, and entered [57] very fully into the reasons of their *judgment, distinguishing the different sorts of privity, in the manner just alluded to, and divided them

¹ B. R., E. 29 El. 3 Co. 22, a. There is a short note of the same case, Moore, 351. Vol. XXVI.—22

into three; viz. 1. Privity in respect of estate only, as, where the lessor grants over the reversion, there is only privity of estate between the grantee and the lessee;¹ and when the lessee assigns his lease, there is only privity of estate between the lessor and the assignee: 2. Privity in respect of contract only, "which," says the report, "is personal privity, and extends only to the person of the lessor, and to the person of the lessee, as in the case at bar, when the lessee assigns over his interest, notwithstanding his assigning, the privity of contract remains between them, although the estate be removed by the act of the lessee himself." 3 Co. 23, a. 3. Privity in respect of estate and contract together, which takes place between the original lessor and lessee. The reasons why the privity of contract should continue after the lessee has assigned are also given by the Court in that case, viz. 1. Because the lessee himself shall not prevent, by his own act, such remedy which the lessor hath against him by his own contract; and, 2. Because the lessee might assign the term to a poor man, who should not be able to manure the land, and who might, for need or for malice, suffer the land to lie fresh, and then the lessor would be without remedy, either by distress, or by action of debt, which would be inconvenient, and in effect concern every man. Ibid. The case concludes with the general position before stated, that "if the lessee assigns over his term, the lessor may charge the lessee or his assignee, at his election;" adding, which is all that was determined in *Marsh v. Brace*,² "that if [58] the lessor accepts the rent of the assignee, he hath determined his election, and shall not have an action against the lessee afterwards, for rent due after the assignment." Ibid. 24, b. The next case is that of *Devereux v. Barlow*, B. R., E. 21 Car. 2, 2 Saund. 181. That also was an action of debt, but brought by the lessor against the assignee of a lease. The defendant pleaded, that from the time of the assignment, and from time to time hitherto, the plaintiff had not acknowledged, but had totally refused, the defendant as his tenant. To this plea the plaintiff demurred; and the Court adjudged that the plea was ill; for that the lessor might refuse to accept of the assignee as his tenant at one time, and yet accept of him afterwards at any time he pleased; and that for the rent then in arrear, the plaintiff might sue the first lessee or the assignee, at his election. Then came the case of *Coghil v. Freelove*, C. B., M. 2 W. & M. 3 Mod. 325, which was to the following effect:

The plaintiff had demised certain premises to one Freelove for twenty-one years: Freelove, pending the term, died intestate, whereupon the defendant, who was his widow, administered; and the action was debt, in the *detinet*, for rent in arrear. The defendant pleaded that, before the rent in question became due, she had assigned the lease, and all her right, title, and interest thereunto, &c., which she had in the premises, and that the plaintiff had notice of this assignment before he brought this action; but nothing was said of acceptance. The plaintiff demurred to this plea, and had judgment, by the unanimous opinion of the Court. On that occasion the Court took

¹ It is said in the case of *Thursby v. Plant*, that in such case the grantee of a reversion could not, at common law, bring covenant against the lessee though he might debt, but that the grantee's right to bring covenant is founded on 82 H. 8, c. 84, 1 Saund. 238, 239.

In *Nurstie v. Hall*, 1 Vent. 10 (which seems to be an imperfect note of the same case with *Thursby v. Plant*, *vide infra*), it is said that an action of covenant lay for the assignee at the common law; and the counsel for the defendant in *Saunders* contend, on the authority of *Spencer's case*, 5 Co. 17, 18, that covenant lay at common law by the assignee for a thing to be done on the land. Serjt. *Williams*, in his edition of *Saunders*, p. 240, n. 8, says, that the better opinion is that the action lay not at common law; and cites *Barker v. Damer*, 3 Mod. 838; *Thrall v. Cornwall*, 1 Wils. 166; and *Webb v. Russell*, 3 T. R. 401.

notice of a mistake committed by Lord COKE in his report of the case of *Walker v. Harris* above-mentioned, *supra*, who there says that it was resolved by POPHAM, C. J., and the whole Court, that if an executor of a lessee for years assign his interest, debt will not lie against him for rent due after such an assignment; whereas Lord POPHAM himself, in reporting that very case, tells us he was of another opinion, which was that, so long as the covenant in the lease hath the nature and essence of a contract, it shall bind the executor of the lessee, who, as well to that as to many other purposes, represents the person of the testator, and is privy to his contracts, Poph. 120.

[*59] After pointing out this *mistake, the Court, in *Coghil v. Freelove*, goes on to say, that whatever that and another former decision may have been, "it is now held, and with great reason, that the privity of contract of the testator is not determined by his death, but his executor shall be charged with all his contracts so long as he hath assets; and therefore such executor shall not discharge himself by making an assignment, but shall be liable for what rent shall incur after he hath assigned his interest; nay, if the testator himself hath assigned the term in his lifetime, yet his executor shall be charged in the *detinet* so long as he hath assets," 3 Mod. 326, 327. On the general question, the authorities which have been just cited go beyond what it is necessary for the present plaintiff to maintain. But another question remains, *vis.*, whether the bankruptcy and certificate of the defendant amount to a discharge. This point, in its present shape, may be considered as perfectly new; for as to the case of *Cantrel v. Graham*,¹ (that case had been referred to by BULLER, Justice, on the former argument), the note in *Barnes* is very short; and as it was only a motion for discharging a defendant on common bail, it would be highly dangerous to draw important consequences of law from it. If, indeed, the bankruptcy is considered simply as an assignment, and it often is to be so considered, the authorities already cited directly apply and are decisive. But it will be said, the defendant has delivered up his all. Every sort of property is devastated out of him, and, although this is a debt accruing after the bankruptcy, yet, as it arises in consequence of a contract made before, and the land, in consideration of which the contract was made is no longer in his power, it would be extremely hard indeed to hold him still liable for the rent. The answer to this is obvious. The bankruptcy was the defendant's own act: it is always so considered; inasmuch as to be criminal in him. The constructive assignment, therefore, by the bankruptcy, does not differ in principle from a common assignment. If there is any hardship in the case, redress must be looked for from the legislature, not from the Court. As to the effect of the certificate, it undoubtedly only discharges debts due before the bankruptcy (except in

[*60] cases expressly provided for by *statute); and there cannot be a stronger argument to prove, that no part of a rent, reserved at a certain day of payment, is a debt till the payment day, than the necessity there was for an act of parliament, in the case of tenants for life, who happen to die between two payment days, to entitle the representatives of such tenants for life to recover a share of the rent, proportioned to the time that the deceased survived the previous quarter day, 11 Geo. 2, c. 19, s. 15. Therefore there is nothing in the circumstance that the contract was made before the bankruptcy. There was a very strong case lately in the Common Pleas, *viz.*, *Aylet v. James*, M. 22 Geo. 3, which was an action of covenant for rent. The defendant pleaded a discharge under the insolvent debtor's act; and the plaintiff having demurred, the plea was overruled, on the ground that, though the contract was made before, the debt (or damages) did not accrue

¹ C. B., E. 8 Geo. 2, *Barnes*, 4to. ed. 69. BULLER, J., quoted it from a MS. report of Serjt. Skinner.

till after, the discharge. The reason is the same, whether the action be debt or covenant.

Heywood.—Before entering upon the argument, it is proper to premise, as a material circumstance in this case, that the action is not upon an express covenant for the payment of the rent, but is merely an action of debt, founded upon the *reddendum* in the lease. Now rent, *ex vi termini*, is paid out of, not for lands. This is an established and well-known rule; and if authorities are necessary to prove that it is, it will be found to be laid down as a principle in Plowden (*Browning v. Beston*, B. R., M. 2 & 3 Ph. & M., Plowd. 132. By Ramsey, *arguendo*), in Coke upon Littleton, 142, a, and in Coke's Reports, William Clun's case, B. R., M. 11 Jac. 1, 10 Co. 127, a, 128, a. So it is defined in Blackstone's Commentaries to be "a certain profit issuing out of lands and tenements corporeal," 2 Blackst. Comm. 41. The distinction between an express covenant and the covenant in law, which arises upon the mere *reddendum* in a lease, is equally well established. The latter is a covenant, but founded on a condition precedent. It is a covenant on the part of the lessee, founded on a condition on the part of the lessor. The lessee undertakes to pay the rent on the condition of his enjoying the land. On this head there is a direct authority in *Siderfin*. The words are, "although, upon an express covenant to pay rent, an action lies against the *lessee for rent in arrear, after his assignment, yet it seemeth that such action doth not lie against the lessee, upon a cove- [*61] nant in law, as upon 'yielding and paying,' after the assignment." The same distinction is laid down in *Fisher v. Ameers*, C. B., H. 8 Jac. 1, 1 Brownl. 20, in Brownlow; for it is there said, that "if I covenant, that I, my executors, administrators, and assigns, shall pay the rent, and I assign over my term, and the assignee pay the rent to the lessor, yet the covenant lieth against the first lessee: otherwise it is, where rent is reserved, and no covenant to pay it; there, if the lessor accept the rent of the assignee, the action will not lie against the executor of the lessee."*

The law therefore is, that an express covenant binds the first lessee, even after acceptance of rent from the assignee, but that the covenant in law, arising out of the *reddendum*, does not bind the first lessee after assignment, and acceptance of rent from the assignee, whether the form of the action against the first lessee be covenant, or debt, though, for the present purpose, it is only necessary to maintain that it does not bind in such case when the form of the action is debt. The case of *Bacheloure v. Gage*, B. R., E. 6 Car. 1, 1 W. Jones, 223, S. C. Cro. Car. 188, goes the whole length of this doctrine. In that case the lessee had covenanted, for himself, his executors, *and assigns, that no building should be erected on the land. The lessee assigned his term, and the lessor accepted rent from the assignee, and af- [*62]

* B. R., E. 22 Car. 2, 1 Sid. 447. There is no name of the case; nor does it appear whether it was a *dictum* from the bench, or only a remark of the reporter.

* So it is laid down by the Court, in *Thursby v. Plant*, B. R., E. 21 Car. 2, 1 Saund. 240, that if a lessee assign his term, and the lessor accept the assignee as his tenant, the lessor cannot have an action of debt for rent against the first lessee, by reason of his acceptance of the assignee, which hath extinguished the privity of contract; but still, in such case, the lessor, after his acceptance of the assignee, may maintain an action of covenant; and, for this, they cite *Bacheloure v. Gage*, from Cro. Car. 188, as having been there adjudged. The following cases are cited by Serjt. Williams, *loc. cit.* in support of the same distinction. *Marrow v. Turpin*, Cro. Eliz. 715, and Moor, 600; *Barnard v. Godscall*, Cro. Jac. 309; *Bacheloure v. Gage*, Cro. Car. 188, and W. Jones, 223; *Norton v. Acklane*, Cro. Car. 579, 1 Roll. Abr. 522, N. pl. 1, 2; *Marsh v. Bruce*, 2 Bulstr. 152; *Glover v. Cope*, 4 Mod. 82; *Edwards v. Morgan*, 3 Lev. 238; *Ashurst v. Mingay*, 2 Show. 183, Lilly's Ent. 185, S. C.; *Thrale v. Cornwall*, 1 Wils. 165; *Chancellor v. Pool*, Dougl. 765; *Eaton v. Jacques*, *ibid.* 460; *Ludford v. Barber*, 1 T. R. 92.

terwards brought covenant against the first lessee, for that the assignee had erected a building contrary to the covenant; and the Court held, that the action well lay, saying, "there is a difference between a covenant in fact and a covenant in law; for if there is a covenant in law, after assignment and acceptance, no action lies against the first lessee; but if there is a covenant in fact, it is otherwise, for, there, upon the covenant in fact, an action always lies against the first lessee."¹ But the principal question in the present case is, whether there is enough stated in this record to be equivalent and tantamount to an acceptance of rent by the lessor from the assignees of the defendant. In the first place it is to be observed, that there is in the plea an averment, that the plaintiff had notice of the bankruptcy, assignment, and entry of the assignee. Now the acceptance of rent, so as to discharge the first lessee, only operates as evidence of notice to the lessor of the change of the tenant; and notice in any other way, though there has been no acceptance of rent, has the same effect. The case of *Marsh v. Brace* is reported at much greater length in *Bulstrode* (2 *Bulstr.* 151), than in *Croke*; and by the report in *Bulstrode* it appears that the question was, whether the plaintiff had notice of the assignment, and the Court held, that the acceptance of the rent was sufficient evidence of such notice.² The same point is to be found in the case of the *Executrix of Henry Hassell* in *Littleton's Reports*, C. B., M. 3 Car. 1, Littl. 53. There, debt being brought against the executrix of the original lessee, she pleaded an assignment by the testator before the day of [63] payment; and upon demurrer, judgment was given for the plaintiff, the Court declaring, that though there was an assignment by the lessee, yet, if there was no notice to the lessor, or acceptance of rent, the defendant was chargeable.—(BULLER, J.—"That being an action against an executrix, she must have been charged as assignee, and, as such, was liable during enjoyment only, and an assignment without notice or acceptance would discharge her.")—What has been said hitherto supposes the privity of contract between the lessor and lessee not to be destroyed by the bankruptcy, but to remain in the bankrupt, notwithstanding the proceedings under the commission. If such privity does not remain in him, there can be no necessity, in order to discharge him, that there should be an acceptance of rent from the assignees. Now, either, 1. the contract is transferred to the assignees, as personal representatives of the bankrupt; or, 2. it was totally annihilated by the bankruptcy. 1. The assignees are to all intents personal representatives as to contracts. In other words, the privity of contract is transferred from the bankrupt to them. The cases on contingent and subsequent debts do not apply here. This is not in the nature of a contingent debt. The rent is payable for, and is in lieu of, the land; or, as it is said in the case of *Browning v. Beston* in *Plowden*, B. R., M. 2 & 3 Ph. & M., *Plowd.* 131, 134, "the one, viz., the rent, comes for the other, viz., the land, and at one same time and by one same contract, and the one is executory for the other." The contract arising on the *reddendum* in a lease may be likened to a contract to receive goods by instalments, at future days, on the payment of certain sums. In such a case, the assignees of a bankrupt may affirm the contract by paying the money when due, and receiving the goods for the

¹ The report adds, that, upon a collateral covenant, the action only lies against the first lessee; to which purpose vide also *Co. Littl.* 115, b.

² The question was, whether it appeared sufficiently, by the words of the plea, that the rent had been accepted by the plaintiff from the assignee, *eo nomine*, as assignee, and not as agent, or servant, to the first lessee; and the Court held, that the acceptance was so pleaded as to amount to an allegation that the rent was accepted from him as assignee. It does not seem to have been argued or supposed, that mere notice of the assignment, without assent by the lessor, would have discharged the lessee.

benefit of the creditors, and this would totally discharge the bankrupt. Here the plea states (and the demurrer admits) the facts alleged in the plea, that the assignees have entered on the premises. Therefore they have affirmed this executory contract; they have deprived the bankrupt of the occupation and profits of the land, which are the ground and consideration for the payment of the rent. The assignees, therefore, and not the bankrupt, ought to bear the burden. In this case of *Thursby v. Plant*, B. R., E. 21 Car. 2, 1 Saund. 237, S. C. 1 Lev. 259, it is asserted, by the *counsel on the one side, *Ibid.* 239, and admitted on the other, *Ibid.* 240, that the [*64] assignment by the commissioners, under the statutes of bankrupt, transfers the privity of contract. The same doctrine is to be found in the case of *Nurstie v. Hall*, in *Ventris*, B. R., H. 20 & 21 Car. 2, 1 Vent. 10, which, indeed, seems to be the same case with *Thursby v. Plant*. In this respect, the situation of the assignees of a bankrupt and that of executors is the same; and that privity of contract as to leases is transferred to executors is settled by a great variety of cases, as it also is that debt lies for rent by the lessor against the executor of the lessee, as much as against the lessee himself; and the reason is given by Lord HALE in the case of *Boulton v. Canon*, B. R., T. 1673, Freem. 336, 337, viz., "because the rent is a charge upon the land, and nothing shall be assets but what is over and above the rent." The same doctrine ought to hold with regard to the assignees of a bankrupt. It may be said that the assignee may have waived the term in the present case, as it has been formerly held that executors might do. The contrary, however, is now settled as to executors. They cannot waive a term without totally renouncing the executorship; though, if they could, they must plead specially that they have waived the term. This was decided, and the reason given, in a case in 1 Modern,¹ where the Court said, "that executors could not waive a term, though, if they could, they ought to plead it specially; for it is naturally in them, and, *primâ facie*, is intended to be of more value than the rent. In like manner, if it should be held that the assignees of a bankrupt may waive a term which was in the bankrupt, still such waiver must be specially pleaded; which not having been done in this case, the Court will not presume a waiver, but will consider the assignee as holding the term, and liable to the rent, as the representative of the defendant. That the term is longer in the defendant is clear. The assignee might surrender it without his concurrence; and if he were to pay the rent, it does not *seem [*65] that he could have any remedy over to recover it back from the assignee.

The inconvenience and hardship, if the contrary doctrine were law, would be enormous. Suppose a builder who has erected houses to a great value upon a building lease for a long term should become bankrupt. His assignees might be receiving annually for the houses 4 or £5000 a year, while the bankrupt continued liable, without any benefit from the premises, to a ground rent perhaps of £1000 a year during all the remainder of the term. But if the first position, viz. that the contract was transferred, has not been established to the conviction of the Court, it remains, in the second place, to show, that, at least, as far as respects the defendant, it was totally extinguished by the bankruptcy; and this is undoubtedly the strongest part of the case. Rent being reserved, as has been before stated, out of the profits of the land, and accruing on the condition that the party paying enjoys the land, it follows, that, wherever the lessee is deprived of the land against his will, and where he can have no remedy over, if there is no express covenant,

¹ S. P. arguendo, in the case in 1 Mod. 185, cited *infra*.

² Anon. C. B., T. 28 Car. 2, 1 Mod. 185, S. C. (probably) by the name of *Trattle v. King*, 2 Jones, 169, though there reported as of M. 38 Car. 2.

but only the common *reddendum*, the rent is also at an end. How would it be, in such a case, if there were an express covenant, is not the point here. The question, where the lessee is deprived of the land, should always be, whether he has any remedy over. This gets rid of all the cases of ouster by strangers, and others of the same sort, where the lessee may have his remedy by action of trespass or otherwise; *Hayes v. Bickerstaff*, C. B., E. 21 Car. 2 Vaugh. 118, 119, *Monk v. Cooper*, B. R., E. 13 Geo. 1, 2 Str. 763. If a lessee be evicted by title paramount, or if the lessor enter upon the whole, or any part, of the premises, the lessee is discharged from the payment of the rent: thus it is said in *Andrews v. Needham*, M. 40 & 41 El. Noy, 75, that, where the land is gone, by the entry of a person who has an elder title, the obligation of the lessee is discharged:¹ and again, in *Kidwelly v. Brand*, C. B., H. 4 & 5 Edw. 6 Plowd. 69, 71, "If the land be recovered upon *eign* title, then the person shall be discharged of the rent from thenceforward;" and, *in almost the same words in *Browning v. Boston*, B. R., M. 2 & 3 Ph. & M., Plowd. 131, 134, viz. "If the land is recovered upon *eign* title, the lessee shall be discharged of payment, because he cannot have the thing for which he is to pay the money." In the case of *Day v. Austin*, B. R., T. 37 El. Cro. El. 98, which was an action of debt for rent, the defendant pleaded, that, before the lease, a judgment was given in debt against the plaintiff, and, afterwards, he made the lease to the defendant, and, after that, the land demised was extended, and delivered in execution by *elegit*, before which extent there was nothing in arrear. The plaintiff demurred, and there was judgment that the plea was good. In *Dorrel v. Andrews*, M. 14 Jac. 1, Hob. 190, the plaintiff, in debt for rent, declared on a demise of certain tenements. The defendant pleaded an entry, and expulsion from the garden-house, part of the premises; and it was held a good plea.² Finally, in *Walker v. Harris*, E. 29 El. 3 Co. 22 a, it was argued by the counsel for the defendant, and not denied by the Court, "that if a man make a lease for years rendering rent, and before the day incurred the lands be evicted by title paramount, the lessor shall not have an action of debt in respect of the contract." So, if the lessee is deprived, by the act of God, of that out of which the rent issues, he is no longer liable to an action of debt upon the *reddendum*, and if only part of the land is destroyed by the act of God, the rent shall be apportioned, as where part is covered by the sea, 1 Roll. Abr. 236, C. pl. 2. But the cases of eviction, where the defendant loses the land by an act of law, are most applicable. The transfer of a bankrupt's effects to the commissioners is an act of law. In *Twiss v. Massey*, Canc. 13th March, 1737, 1 Atk. 67, Lord HARDWICKE says, "A commission of bankrupt is an action and execution in the first instance;" and in *Goring v. Warner*, Canc. M. 11 Geo. 1, 7 Vin. 85, pl. 9, Lord MACCLESFIELD held, that an assignment by the commissioners under a commission against the bankrupt executor of a lessee, was good without license, although there was an express proviso in the lease against assignment without *license; [*67] "For," said he, "the assignment by the commissioners is done by the authority of a statute, which will supersede any private agreement of the parties inconsistent with it." And in *Mayor v. Steward*, B. R., T. 9 Geo. 3, 4 Burr. 2439, 2446, Lord MANSFIELD treats the operation of a commission of bankrupt as an act of law when he says, "that it might seem hard to leave a lessee liable to covenants in a lease, when an act of law had divested

¹The question there was on a covenant by the lessee to yield up all the demised premises at the end of the term, but the principle of the determination seems to apply.

²It does not appear that there was a demurrer to the plea; but it is stated by Robart to be well pleaded.

him of the emoluments, and vested them in his creditors." A commission of bankrupt is to be considered as a confiscation of everything belonging to the bankrupt, for the benefit of his creditors. The commission tells the bankrupt, "You are not fit to be trusted any longer. Here you shall stop. Here all your interest and control over your effects shall, for the safety of your creditors, be devested out of you." This affords the true distinction between bankrupts and insolvent debtors. The proceedings against the first are compulsory on the party; those in respect to the latter voluntary. The bankrupt acts are entitled *against* bankrupts; the insolvent acts, for the *relief* of insolvent debtors. *Aylet v. James* was the case of an insolvent debtor, and it was held that he should not discharge himself by his own act, by taking advantage voluntarily of the statute. Besides, that was an action of covenant, upon an express covenant; and, moreover, the plea was defective, not authorized by the statute, and could not have been supported. There is no case in its circumstances exactly parallel to the present, unless it be *Cantrel v. Graham*, *supra cit.*; but, in *Mayor v. Steward*, *supra cit.*, the Court showed a strong inclination in favor of the bankrupt; and in the passage above referred to from that case, Lord MANSFIELD laid great stress on the covenant there being express and collateral, not running with the land. But the *reddendum* is a mere covenant in law, running with and resulting from the enjoyment of the land. Upon the whole, if the bankruptcy operates as an eviction, as an act of law, and the privity of contract is discharged; if the assignee is the personal representative of the bankrupt, and, by not waiving, but entering on the premises, affirms the contract, the privity is transferred to him; or, if that privity still subsists in the bankrupt, yet, if there has been notice or *acceptance of the assignee by the lessor, the lessee is no longer liable, or, at least, is only liable in covenant, not in debt, and so the form of the action is mistaken. If any one of those positions has been proved, there must be judgment for the defendant. [*68]

Bearcroft in reply.—It is said, this is not an express covenant, but only a covenant in law. But, according to my idea of the distinction, this is an express covenant. Wherever the words of the party under seal show an intent to do an act, that I consider as an express covenant. A covenant in law is where there are no such words, but the obligation *tacite incit*, and arises from the nature of the thing. I agree, in some respects, that this is a covenant on a condition precedent. But the condition is only, that the lessee shall enjoy the land demised, against all acts of the lessor, and precedent claims, but not against his own acts. The cases which I have cited were actions of debt, as this is, not actions of covenant. It is argued, that notice and acceptance are the same thing; but that is not true. Acceptance is notice, but notice is not equivalent to acceptance. No case has been cited to establish this position; and that of *Coghill v. Freelove*, *supra cit.*, marks the distinction. In *Marsh v. Brace* there was an acceptance. With regard to the passages referred to in *Coke* upon *Littleton* and *Blackstone's Commentaries*, it is not in general to writers or institutes that we are to look for the law of particular cases; and, therefore, whatever may be there said, will not overturn the express principle of the decision in *Walker v. Harris*, *supra cit.* The act of bankruptcy, and the commission and assignment consequent upon it, can never be held to be equivalent to an acceptance; for the acceptance must be the act of the lessor. Suppose the lessee, for some public offence, had forfeited his chattels, and this lease, among the rest, to the crown—would he not still be liable for the rent to the lessor? I agree, that, where a lessee is deprived of the land, purely by act of law, without any fault of his own, he is discharged from the payment of rent. But it is begging the question to consider that as being the case here. The bankruptcy is the mere act of

the party. It was voluntary in him to become a trader, and there is hardly such a thing as a compulsory act of bankruptcy; which is so much considered [*69] by the law as voluntary, that it is treated as a crime. It is true that the estate of a bankrupt is transferred by law to the commissioners and assignees. But that transfer attaches only upon the previous acts of the party. It is said that the bankruptcy is a confiscation; but the application of a word to a subject to which it does not belong, does not vary the argument. I admit that there is some difference between the case of an insolvent debtor and a bankrupt. But that difference amounts only to this, that, in the case of an insolvent debtor, the whole is voluntary on his own act; in the case of a bankrupt only a part is so; but that is so material a part as to be the foundation of all the rest. The case of *Mayor v. Steward* is no authority on the present question. The most that can be drawn from it is, that the Court were struck with the hardship of a case like this. But there are many things which are, or seem to be hardships, which nevertheless are law; and the Court did not even hint at an opinion, or make use of a *dictum* tending to support the present defence. In *Goring v. Warner*, *supra cit.*, Lord MACCLESFIELD said, "I think this a proper case for relief in a court of equity." Therefore, the relief in the present case, if any is to be had, is not at law. However, as to the hardship, why that is greater here than in the case of annuities, where bankrupts continue liable for the payments accruing due after the bankruptcy?

The Court took time to consider till this day, when Lord MANSFIELD delivered their opinion as follows:

Lord MANSFIELD.—"This is an action of debt for rent on a lease for years made by the plaintiff to the defendant.

"The defendant has pleaded that he was a trader, and, before the rent became due, he committed an act of bankruptcy; that a commission of bankruptcy issued against him, and he was declared a bankrupt, and the commissioners assigned his effects to one Morgan, who, before the rent became due, entered into the premises; that the plaintiff had notice of all this, and the defendant has conformed to the several statutes respecting bankrupts.

"To this plea there is a general demurrer; and two points have been urged at the bar on the part of the plaintiff.

[*70] "1. That, if there had been no bankruptcy in the case, *but the defendant had assigned the lease to a third person, yet he would have been answerable in debt for the rent, unless the plaintiff had accepted rent from the assignee.

"2. That the commission of bankruptcy, and the assignment under it, being founded on an act done by the defendant himself, viz., the act of bankruptcy, shall operate only as an assignment made by the defendant, and, therefore, he is still liable to an action of debt for the rent; the plea not having stated that the plaintiff accepted any rent from the assignee.

"As to the first point, we do not think it necessary that there should be an actual acceptance of rent from the assignee, by the lessor, to discharge the lessee from the action of debt which he is liable to on the *reddendum* of the lease. We are of opinion, that any assent, on the part of the landlord, to the assignment, will have the same effect.

"The action of debt is founded, not simply on the demise, but on the subsequent enjoyment; and it is not necessary, in such an action, to state the deed at all.

"This point was much discussed and considered in the case of *Warren v. Consett*, B. R., T. 18 Geo. 1 & 1 Geo. 2, 2 Lord Raym. 1500, S. C. 2 Str. 778, where it was agreed, that *nil debet* is a good plea in an action of debt for rent, because the specialty is only inducement to the action; and the plaintiff need not set out the indenture.

"What shall be deemed an enjoyment by the lessee is very much a question of law. The lessee cannot, by his own act, without the assent of the lessor, destroy the tenancy; and therefore, till such assent is given, the lessor may avow on the lessee, as his tenant, notwithstanding an assignment has been made, and the assignee is actually in possession of the land. Upon such an avowry, evidence of enjoyment by the assignee (not accepted tenant by the landlord), would be proof of enjoyment by the lessee.

"For the defendant, it was insisted, that notice alone to the landlord of the assignment, was sufficient to discharge the lessee from the action of debt.

"But, in our judgments, none of the cases cited warrant that position.

"In *Fisher v. Amers*, *supra cit.*, and *Marsh v. Brace*, *supra cit.*, [*71] *acceptance of rent from the assignee is stated; and in 1 Sid. 447, which is a very short and incorrect note, it must be understood that there was an acceptance of rent, or an assent to the assignment, by the landlord. And in *Devereux v. Barlow*, *supra cit.*, which was an action of debt against an assignee before acceptance, it was held, that the lessor might sue either the lessee or the assignee.

"In the present case, neither acceptance of rent, nor any assent by the landlord to the assignment, is stated in the plea; and therefore, if the assignment under the commission has no other effect than an assignment by the lessee himself, we are all of opinion that the defendant will be liable to pay the rent in this action.

"2. This brings the case to the second question, viz.: what is the effect of the assignment, under the commission of bankrupt?

"Only two cases have been quoted applicable to this point; for *Aylet v. James* is very distinguishable from the present, in the pleadings, as well as in the question before the Court.

"The two cases are *Mayor v. Steward*, *supra*, p. 67, and *Cantrel v. Graham*, *supra*, p. 59.

"The case of *Mayor v. Steward* was determined on a different point, namely, that the covenant on which the action was brought was a distinct and independent covenant, and not a covenant which run with the land. But a strong though an *obiter* opinion was delivered by Mr. Justice YATES on this point, who said, that as the commission, and proceedings under it, devert the bankrupt of his whole estate, and render him absolutely incapable of performing the covenant, it would be a hardship on him, if he should remain still liable to it, *when he is disabled by the act of parliament from performing it*, 4 Burr. 2443.

"The Court afterwards adopted that opinion, and said that, in a case between the lessor and lessee, it might have seemed hard to leave the lessee liable to covenants, when an act of law had divested him of the emoluments, and vested them in his creditors.

"In *Cantrel v. Graham*, the Court made a direct *determination on the point. In a manuscript note, from whence I shall cite it, the case is called *Canter v. Graham*; and there it is said, that Serjeant Skinner moved, that the defendant might be discharged on common bail. It appeared that the defendant, in 1727, had taken a house, by lease, of the plaintiff's intestate, for nine years, with the usual covenants; that, after three years, he left it, and one Gukin lived in it, who paid rent to the intestate; that, in 1733, the defendant became a bankrupt, and his certificate was allowed and confirmed; and the action was brought against the defendant for the rent of the two last years of the term, which had incurred since the allowance of the certificate.

"The Court said, by the bankruptcy, the lease became vested in the commissioners, and is by them assigned to the assignees, so that, from that time,

the defendant ceased to be tenant of the premises, and, therefore, he cannot be chargeable for the rent after incurred; and the defendant was discharged on common bail.

"The counsel for the present plaintiff endeavored to impeach the authority of that case, by saying it was only a motion to discharge the defendant on filing common bail; and seemed to suppose that the Court might do that, on account of the hardship of the case, without much regard to what the strict law was. But, at that time, the Court would not, against a positive affidavit of debt, have discharged the defendant on common bail, unless they had thought that the law was clearly with him; and it is manifest, from the words in which the judgment was given, that it was founded wholly on the strict law of the case, and not on any circumstances to govern the discretion of the Court.

"Legal reason is strong with the determination: for the estate is transferred, and vested in the assignees, by virtue of the acts of parliament respecting bankrupts; every man's assent is virtually included in an act of parliament, and therefore it is equivalent to an express assent.

"It was admitted, on the part of the plaintiff, that if the estate were divested out of the lessee purely by the act of law, without any fault of his, he would be discharged.

"We think this case must be so considered; for though the commission is founded on an act originally done by the defendant, viz., the act of bankruptcy, yet the commission and assignment by virtue of the acts of parliament are the *actual and immediate cause of divesting the estate out of the
[*73] bankrupt; *et, in jure, non remota causa, sed proxima, spectatur.*

"Therefore we are all of opinion that there must be judgment for the defendant."
Judgment for the defendant.¹

¹ In the case of Mills and Auriol, 1 H. Bl. 433, and Auriol v. Mills in error, 4 T. R. 94, the law of this case was considered and approved; and it was there decided, in contradistinction to it, that in an action upon an express covenant for payment of rent, bankruptcy of the defendant is no bar.

THE KING v. SHIPLEY.¹ Nov. 22.

On the trial of an indictment for a libel, the only questions for the jury are the fact of publication, and the truth of the innuendos. The question of libel or no libel is, necessarily, a question of law, for the sole consideration of the Court out of which the record comes, and on which the judge at the trial is not called upon to give his opinion to the jury.

*Dissentiente WILLES, J.*²

It is no answer to a charge of criminal publication of a libel to show that the defendant had been told it was libellous, and not fit to be disseminated generally in the

¹ A report of this case is published in the Collection of Speeches of Lord Erskine, by Ridgeway, 1st vol. p. 187 (2d ed.). That report contains Lord Erskine's speech at the trial, Mr. Justice BULLER's charge, and an account of the proceedings at Nisi Prius; also Lord Erskine's speech in moving for a new trial, and in support of the rule, and Lord MANSFIELD's opinion in giving judgment for the discharge of that rule. The report of Lord MANSFIELD's judgment is also printed in a note to Rex v. Withers, 8 T. R. 428. The present report is printed, nearly, as prepared for publication by Lord Glenbervie. Some trifling additions are from Mr. Justice LE BLANC's notes, and Mr. Bower's. The arguments of counsel against the rule, and the judgments of WILLES and ASHURST, Justices, are not, to the editor's knowledge, elsewhere in print. In the other parts of the report it corresponds, frequently *verbatim*, with Lord Erskine's; Lord G. having, probably, made use of a publication of a part of the case by Lord E., which appeared soon after the decision of the cause.

² See also the declaratory act, 82 G. 3, c. 60, contra.

neighborhood, and that he printed it with a view to disprove the imputation of having intended to promulgate a libel. These facts, if the composition be a libel, are, so far from constituting a defence, in aggravation rather than in mitigation of his guilt.

THIS case arose upon an indictment for a libel, against William Davies Shipley, dean of St. Asaph, which was *found, by the grand jury for the county of Denbigh, at Wrexham, at the Spring Great Sessions, [*74] 28 Geo. 3. The defendant pleaded not guilty: the indictment having been removed by *certiorari* into the Court of King's Bench, it was sent down to be tried at the last assizes for Shropshire, being the next English county: and on Friday, the 6th of August, 1784, the trial came on, before BULLER, J., and a special jury.

The indictment contained two counts. The first was in the following words:

"The jurors for our sovereign lord the king upon their oath present, That William Davies Shipley, late of Llannerch Park, in the parish of St. Asaph, in the county of Flint, clerk, being a person of a wicked and turbulent disposition, and maliciously designing and intending to excite and diffuse among the subjects of this realm discontents, jealousies, and suspicions of our lord the king and his government, and disaffection and disloyalty to the person and government of our lord the now king; and to raise very dangerous seditions and tumults within this kingdom, and to draw the government of this kingdom into great scandal, infamy, and disgrace; and to incite the subjects of our lord the king to attempt by force and violence, and with arms, to make alterations in the government, state, and constitution of this kingdom; on the first day of April, in the twenty-third year of the reign of our sovereign lord George the Third, now King of Great Britain, &c., at Wrexham aforesaid, in the county of Denbigh aforesaid, wickedly and seditiously published, and caused and procured to be published, a certain false, wicked, malicious, seditious, and scandalous libel, of and concerning our said lord the king, and the government of this realm, in the form of a supposed dialogue, between a supposed gentleman, and a supposed farmer—wherein the part of the supposed gentleman, in the supposed dialogue, is denoted by the letter G., and the part of the supposed farmer, in such supposed dialogue, is denoted by the letter F.—intituled, 'THE PRINCIPLES OF GOVERNMENT IN A DIALOGUE BETWEEN A GENTLEMAN AND A FARMER;' in which said libel are contained the false, wicked, malicious, seditions, and scandalous matters following; to wit,

*"F. (meaning the said supposed farmer).¹ Why should humble men like me (meaning the said supposed farmer),² sign or set marks [*75] to petitions of this nature? It is better for us farmers to mind our husbandry, and leave what we cannot comprehend to the king and parliament. G. (meaning the said supposed gentleman). You can comprehend more than you imagine, and, as a free member of a free state, have higher things to mind than you may conceive. F. If by free you mean out of prison, I hope to continue so, as long as I can pay my rent to the squire's bailiff: but what is meant by a free state? G. Tell me first what is meant by a club in the village, of which I know you to be a member. F. It is an assembly of men who meet after work every Saturday, to be merry and happy for a few hours in the week. G. Have you no other object but mirth? F. Yes, we have a box into which we contribute equally from our monthly or weekly savings, and out of which any members of the club are to be relieved in sickness or

¹The same *innuendo* was repeated wherever F. or any pronoun applicable to the farmer occurred.

²The same *innuendo* was repeated wherever G. or any pronoun applicable to the gentleman occurred.

poverty : for the parish officers are so cruel and insolent, that it were better to starve than apply to them (meaning parish officers) for relief. G. Did they (meaning parish officers), or the squire, or the parson, or all together, compel you and the several persons composing such club to form this society? F. Oh no! we (meaning the said club) could not be compelled; we (meaning the said club) formed it by our own choice. G. You (meaning the said club) did right. But have you (meaning the said club) not some head, or president of your club? F. The master for each night is chosen by all the company present the week before. G. Does he (meaning such master) make laws to bind you (meaning the said club), in case of ill-temper or misbehaviour? F. He (meaning such master) make laws! he (meaning the said master) bind us! no, we have all agreed to a set of certain rules, which are signed by every new comer, and were written in a strange hand by young Spelman, the lawyer's clerk, whose uncle is a member. G. What should you (meaning the said club) do, if any one member were to insist on becoming perpetual master, and on altering your (meaning the said club's) rules at

[*76] his *(meaning such one member's) arbitrary will and pleasure? F. We (meaning the said club) should expel him (meaning such one member). G. What if he (meaning such one member) were to bring a sergeant's guard, when the militia are quartered in your neighborhood, and insist upon your (meaning such club's) obeying him? (meaning such one member). F. We (meaning such club) should resist, if we (meaning the said club) could; if not, the society would be broken up. G. Suppose that with his (meaning such one member's) sergeant's guard, he (meaning such one member) were to take the money out of the box, or out of your (meaning the members of the club's) pockets. F. Would not that be a robbery? G. I am seeking information from you : how should you (meaning the said club) act on such an occasion? F. We (meaning the said club) should submit perhaps at that time, but should afterwards try to apprehend the robbers. G. What if you (meaning the said club) could not apprehend them? F. We (meaning the said club) might kill them, I should think; and if the king (meaning our said lord the king) would not pardon us (meaning the said club), God would. G. How could you (meaning the said club) either apprehend them (meaning the said robbers), or, if they (meaning the said robbers) resisted, kill them, without a sufficient force in your (meaning the said club's) own hands? F. Oh! we (meaning the said club) are all good players at single-stick, and each of us (meaning the said club) has a stout cudgel, or quarter-staff, in the corner of his room. G. Suppose that a few of the club were to domineer over the rest, and insist upon making laws for them? (meaning the rest of the said club). F. We (meaning the rest of the said club) must take the same course; except that it would be easier to restrain one man than a number; but we (meaning the rest of the said club) should be the majority, with justice on our side. G. A word or two on another head. Some of you (meaning the said club), I presume, are no great accountants. F. Few of us (meaning the said club) understand accounts; but we (meaning the said club) trust old Lilly, the schoolmaster, whom we (meaning the said club) believe to be an honest man; and he keeps the key of our (meaning the said club's) box. G. If your (meaning the said club's) money should in time amount to a large sum, it might not perhaps be safe to keep it (meaning such large sum) at his (meaning Lilly's) house, or in any private house.

[*77] *F. Where else should we (meaning the said club) keep it? (meaning such large sum). G. You (meaning the said club) might choose to put it (meaning such money) into the funds, or to lend it to the squire, who has lost so much lately at Newmarket, taking his bond, or some of his fields, as your (meaning the said club's) security for payment, with interest.

F. We (meaning the said club) must, in that case, confide in young Spelman, who will soon set up for himself, and, if a lawyer can be honest, will be an honest lawyer. G. What power do you (meaning the said club) give to Lilly? or should you (meaning the said club) give to Spelman in the case supposed? F. No power; we (meaning the said club) should give them both (meaning Lilly and Spelman) a due allowance for their trouble, and should expect a faithful account of all they had done for us (meaning the said club). G. Honest men may change their nature. What if both or either of them (meaning Lilly and Spelman) were to deceive you? (meaning the said club). F. We (meaning the said club) should remove them (meaning Lilly and Spelman), put our (meaning the said club's) trust in better men, and try to repair our (meaning the said club's) loss. G. Did it never occur to you that every state or nation was only a great club? F. Nothing ever occurred to me on the subject, for I never thought about it. G. Though you never thought before on the subject, yet you may be able to tell me why you suppose men to have assembled, and to have formed nations, communities, or states, which all mean the same thing. F. In order, I should imagine, to be as happy as they (meaning men) can, while they (meaning men) live. G. By happy, do you mean merry only? F. To be as merry as they (meaning men) can, without hurting themselves or their neighbors; but chiefly to secure themselves from danger, and to relieve their wants. G. Do you believe that any king or emperor compelled them (meaning men) so to associate? F. How could one man compel a multitude? A king, or an emperor, I presume, is not born with a hundred hands. G. When a prince of the blood shall in any country be so distinguished by nature, I shall then, and then only, conceive him (meaning such prince) to be a greater man than you. But might not an army, with a king or general at their head, have compelled them (meaning men) to assemble? F. Yes; but *the army must [*78] have been formed by their own choice: one man, or a few, can never govern many without their consent. G. Suppose, however, that a multitude of men, assembled in a town or city, were to choose a king or governor, might they (meaning such multitude) not give him (meaning such king or governor) high power and authority? F. To be sure; but they (meaning such multitude) would never be so mad, I hope, as to give him (meaning such king or governor) a power of making their (meaning such multitude's) laws. G. Who else should make them (meaning laws)? F. The whole nation or people. G. What if they (meaning the nation or people) disagree? F. The opinion of the greater number, as in our village clubs, must be taken and prevail. G. What could be done if the society were so large that all could not meet in the same place? F. A greater number must choose a less. G. Who should be choosers? F. All those that are not upon the parish. In our club (meaning the said club), if a man asks relief of the overseer, he ceases to be one of us (meaning the said club), because he (meaning the said man) must depend on the overseer. G. Could not a few men, one in seven, for instance, choose the assembly of law-makers, as well as a larger number? F. As conveniently, perhaps; but I would not suffer any man to choose another, who was to make the laws by which my money or my life might be taken from me. G. Have you a freehold in any county of forty shillings a year? F. I have nothing in the world but my cattle, implements of husbandry, and household goods, together with my farm, for which I pay a fixed rent to the squire. G. Have you a vote in any city or borough? F. I have no vote at all, but am able, by my honest labor, to support my wife and four children; and whilst I act honestly, I may defy the laws. G. Can you be ignorant that the parliament, to which members are sent by this county, and by the next market-town, have power to make new laws, by which you and

your family may be stripped of your goods, thrown into prison, and even deprived of your life? F. A dreadful power! I never made inquiries, having business of my own, concerning the business of parliament, but imagined that the laws had been fixed for many hundred years. G. The common laws, to which you refer, are equal, just, and humane; but the king (meaning our said lord the king) and parliament (meaning *the parliament of this realm) [*79] may alter them (meaning the laws of this realm) when they (meaning our said lord the king and the said parliament) please. F. The king ought therefore to be a good man, and the parliament to consist of men equally good. G. The king alone can do no harm: but who must judge the goodness of parliament men? F. All those whose property, freedom, and lives may be affected by their (meaning the parliament men's) laws. G. Yet six men in seven, who inhabit this kingdom (meaning the kingdom of Great Britain), have, like you, no votes (meaning votes in the election of members of the house of commons of this kingdom); and the petition which I desired you to sign has nothing for its (meaning such petition's) object, but the restoration of you all (meaning the six men in seven who inhabit this kingdom having no votes as aforesaid) to the right of choosing those law-makers by whom your (meaning the last-mentioned men's) money or your (meaning the last-mentioned men's) lives may be taken from you (meaning the last-mentioned men). Attend while I read it (meaning the said petition) distinctly. F. Give me your pen: I never wrote my name, ill as it may be written, with greater eagerness. G. I applaud you, and trust that your example will be followed by millions. Another word before we (meaning the said supposed gentleman, and the said supposed farmer) part. Recollect your opinion about your club in the village (meaning the said club), and tell me what ought to be the consequence, if the king (meaning our said lord the king) alone were to insist on making laws, or on altering them at his (meaning our said lord the king's) will and pleasure. F. He (meaning our said lord the king), too, must be expelled. G. Oh! but think of his (meaning our said lord the king's) standing army, and of the militia, which now are his (meaning our said lord the king's) in substance, though ours (meaning the subjects of this realm) in form. F. If he (meaning our said lord the king) were to employ that force against the nation (meaning the subjects of this realm) they (meaning the said nation) would and ought to resist him (meaning our said lord the king), or the state would cease to be a state. G. What if the great accountants and great lawyers, and Lillys and Spelmans of the nation (meaning this kingdom), were to abuse their (meaning the said great accountants and lawyers') trust, and cruelly injure, instead of faithfully serving, [*80] the *public? F. We (meaning the subjects of this realm) must request the king (meaning our said lord the king) to remove them (meaning the said great accountants and great lawyers), and make trial of others; but none should be implicitly trusted. G. But what if a few great lords, or wealthy men, were to keep the king (meaning our said lord the king) himself in subjection, yet exert his (meaning our said lord the king's) force, lavish his (meaning our said lord the king's) treasure, and misuse his (meaning our said lord the king's) name, so as to domineer over the people (meaning the subjects of this realm), and manage the parliament? (meaning the parliament of this realm). F. We (meaning the subjects of this realm) must fight for the king (meaning our said lord the king) and ourselves (meaning the said subjects of this realm). G. You talk of fighting as if you were speaking of some rustic engagement at a wake; but your (meaning the subjects of this realm's) quarter-staffs would avail you (meaning the said subjects) little against bayonets. F. We (meaning the said subjects) might easily provide ourselves (meaning the said subjects) with better arms. G.

Not so easily : when the moment of resistance came, you (meaning the said subjects) would be deprived of all arms ; and those who should furnish you (meaning the said subjects) with them (meaning arms), or exhort you (meaning the said subjects) to take them (meaning arms) up, would be called traitors, and probably put to death. F. We (meaning the said subjects) ought always therefore to be ready, and keep each of us (meaning such subjects) a strong firelock in the corner of his (meaning such subject's) bed-room. G. That would be legal as well as rational. Are you, my honest friend, provided with a musket ? F. I will contribute no more to the club (meaning the club above mentioned), and purchase a firelock with my savings. G. It is not necessary. I have two (meaning two firelocks), and will make you a present of one (meaning one firelock) with accoutrements. F. I accept it (meaning the said last-mentioned firelock) thankfully, and will converse with you at your leisure on other subjects of this kind. G. In the mean while, spend an hour every morning in the next fortnight in learning to prime and load expeditiously : I say every morning, because if you exercise too late in evening, you may fall into some of the legal snares which have been spread for you by those gentlemen who would *rather secure game for the table than liberty for the nation (meaning this realm). F. Some of my [*81] neighbors who have served in the militia (meaning the militia of this realm) will readily teach me : and perhaps the whole village may be persuaded to procure arms and learn their exercise. G. It cannot be expected that the villagers should purchase arms ; but they (meaning such villagers) might easily be supplied, if the gentry of the nation (meaning this realm) would spare a little from their (meaning such gentry's) vices and luxury. F. May they (meaning such gentry) turn to some sense of honor and virtue. G. Farewell at present, and remember that a free state is only a more numerous and more powerful club ; and that he only is a free man who is member of such a state. F. Good morning, sir ; you have made me wiser and better than I was yesterday ; and yet, methinks, I had some knowledge in my own mind of this great subject, and have been a politician all my life without perceiving it."—In contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown, and dignity.

The second count differed only from the first in leaving out the *innuendos* after the personal pronouns "*I*," "*you*," &c.

The jury withdrew for some time, and, on their return, their foreman said, they found the defendant "*guilty of publishing only*." But after some conversation between them and the Judge, they agreed that their verdict should be in the following words ; viz., "*guilty of publishing, but whether a libel or not, the jury do not find*."

On Monday, the 8th of November, *Erskine* obtained a rule for a new trial ; the general foundation of his motion being the misdirection of the Judge in point of law. The particular grounds and arguments will be better understood, after the report of the evidence has been stated.

Lord MANSFIELD, when the motion was made, expressed a desire that, if it was intended to move in arrest of judgment, both rules might be applied for at the same time, because he thought many of the arguments made use of by *Erskine* in order to support his motion for a new trial went to arrest the judgment, and he was, he said, very unwilling to decide the questions separately. However, *Erskine* said, it was unnecessary for him, in that stage of the proceedings, to *determine whether he should or should not move in arrest of judgment ; and, after some conversation between [*82] the bench and the bar, it was agreed that, in criminal cases, you are not confined to the first four days of the term to move in arrest of judgment, but may do it at any time before judgment is actually pronounced.

BULLER, Justice.—Many things have been mistaken in this case, which I choose to set right now.

It has been suggested that, in my charge to the jury, I told them it was the language of a party. I said no such thing. I told them then, as I believe now, it was not the language of any set of men whatever.

It is said, I told the jury they had no right to find a general verdict. I certainly said no such thing. I stated what I thought the law, viz., that the question of libel or no libel is matter of law for the court, not for the jury. That *publication* and the meaning of the *innuendos* were questions of fact; and that, if they doubted upon either of those two points, they must acquit.

As to the verdict, there was much interruption on the part of the counsel for the defendant, in my opinion improper. I will state what I did. They brought in a verdict of *guilty of publishing only*, which I refused to take; in which, I conceive, I did right. The jury were asked if they found it a libel: they said, no. An improper use was made of that: the counsel for the defendant said, they find it *no libel*. The jury said they found no such thing: they did not mean to find whether it was a libel or not, one way or the other. As to the observations made by the counsel upon the course pursued by me on this occasion, if thrown out *ad captandum*, they might as well have been spared. If it was meant to insinuate that I had any wish against the defendant, it is as false as it is scandalous.

On the Monday following (the 15th of November), which was the day appointed by the court for the prosecutor's counsel to show cause, **BULLER, J.**, made his report of the evidence to the following effect.

For the prosecution, were called the Reverend Edward Edwards, John Marsh, and William Jones.

Edwards proved, that he received a copy of the pamphlet set forth in the indictment, with the words "*Gentleman and Farmer*" endorsed upon it, in the handwriting of the defendant, inclosed in a letter from him in [83] the year 1783. The *letter, bearing date the 24th of January, was in these words:—"I will trouble you to get an edition of the inclosed dialogue printed by Marsh, as soon as possible, with the following advertisement annexed to it. He may put a price of twopence or threepence, to bear expenses. I shall advertise it in the Chester paper, on Tuesday, so I hope it will be printed by that day. Yours, W. D. Shipley."

"ADVERTISEMENT to be put at the beginning."

"A short defence hath been thought necessary against a violent and groundless attack upon the Flintshire committee, for having testified their approbation of the following dialogue, which has been publicly branded with the most injurious epithets; and it is conceived that the sure way to vindicate this little tract from so unjust a character will be as publicly to produce it. The friends of the revolution will instantly see, that it contains no principle which has not the support of the highest authority, as well as the clearest reason.

"If the doctrines, which it slightly touches, in a manner suited to the nature of the dialogue, be seditious, treasonable and diabolical, Lord Somers was an incendiary, Locke a traitor, and the convention parliament a *Pandæmonium*; but if those men are the glory and boast of England, and if that convention secured our liberty and happiness, then the doctrines in question are, not only just and rational, but constitutional and salutary; and the reproachful epithets belong wholly to the system of those who so grossly misapplied them." Edwards delivered the pamphlet and advertisement to Marsh.

Marsh, who was a bookseller and printer, at Wrexham, proved the printing of the pamphlet and advertisement, according to the directions in the letter;

that Jones, the other witness, had come to buy some copies at his shop, and had taken down his (Marsh's) name, and his father's, who was his partner; and that, before the whole impression was struck off, he had seen the defendant, and told him so, who seemed quite surprised that anything of that kind should pass, and that any disturbance should be made about the matter.

Jones proved, that he had bought a copy, which he produced at Marsh's shop.

On his cross-examination he said, that Mr. Fitzmaurice, who was sheriff of the county in 1783, had carried on the *prosecution at first, but that he afterwards had declined it; and that he (the witness), who [†84] was an attorney, was then the prosecutor. He said, that Fitzmaurice had declined in consequence of an answer he had received to an application made to the treasury; but being asked what that answer was, I said it was not evidence.

The pamphlet was then read; and there the evidence for the prosecution ended.

For the defendant, was called Edward Jones, who proved, that he was a member of the Flintshire committee, and that there was a resolution of that committee, to translate the pamphlet into Welsh; that it was put into his hands to get that done, that he had talked with the defendant about it, who said he had received it from Sir William Jones (the author) so very lately, that he had not time to read it; that he afterwards wrote to the defendant, mentioning certain resolutions the Flintshire committee had come to, adopting certain resolutions of the county of York as to the extension of the representation in parliament; and, at the same time informing him, that he had collected the opinion of some gentlemen, that the pamphlet might do harm, and telling him, that he (the witness) thought the defendant would do better not to publish it: that he also informed him, that they had resolved, at a prior meeting, to call another meeting of the county together, to consider of an address; that he did not see the defendant again till the morning of that last mentioned meeting; who then said to him, "I am very much obliged to you for what you have communicated to me respecting the pamphlet; I should be exceedingly sorry to publish anything that should tend to sedition." That, in consequence of that declaration, he returned the pamphlet to the defendant, and it never was translated; that the meeting was on the 7th of January, that some people had made pretty free with the defendant for wishing to publish a thing of that sort; that it had been much talked of, and was very much reprehended by some persons at the meeting; that the witness's principal objection to its being published was, that the Flintshire committee had adopted the resolution of the York committee, which the pamphlet directly contradicted. On his cross-examination he said, that at the meeting it was publicly said, in the presence of the defendant, that the pamphlet was treasonable, and many opprobrious epithets were made use of; upon which the defendant said, "I am *now called upon to show that this pamphlet is not seditious, and I read it with a rope [†85] about my neck." That the defendant then read it, and the witness collected from what he said, that his opinion was, that the dialogue was legal and constitutional: that he said, "Now I have read this in public, I don't think it so bad a thing, and I think we ought to publish it in vindication of the committee."

Witnesses were then tendered, to speak to the general deportment and behavior of the defendant. I said, I had never seen evidence of that sort produced in such cases, that it operated much in the same way as it would in cases of felony, and might have effect afterwards with regard to the punishment. I added, however, that I had no sort of objection to receive it, and

no objection being made on the part of the prosecutor, several gentlemen of fortune and character in the county of Flint were called, who concurred in saying, they did not think the defendant was a person capable of stirring up rebellion, or sedition; but looked upon him to be of a peaceable disposition, and a good subject.

After having stated the evidence, BULLER, Justice, proceeded as follows:—
 “The jury that tried this indictment was a full special jury. After retiring to consider the evidence, they brought in a verdict in the very same words with that given in the case of *Rex v. Woodfall*.¹ Every one knows the history of that case; and it occurred to me, that I ought not to take the verdict in those words, because it would be imperfect. I therefore said that when I knew their meaning, I would take their verdict agreeable to such meaning; and I asked whether they meant to find the *innuendoes*. They said they did. After some time they told me, they meant to find the defendant guilty of publishing the pamphlet, but not to say whether it was, or was not, a seditious libel. I thought that was, in substance, a special verdict, and considered what words would give it that effect, and it was agreed that it should be in the words in which it was in fact taken by the officer. *Supra*, p. 81. I do not find that any objection is now made to that form of words.

But there have been two objections stated to my direction to the jury, viz.

[*86] *1. “That I did not leave the question of libel to them, nor give any opinion upon it myself;

2. “That I did not leave it to the jury to acquit the defendant, on the ground, that it appeared, by the advertisement, and the evidence given for him, that his intentions were innocent and not seditious.

1. “As to the first, I thought the law fully settled, by a long train of authorities, and that I was not at liberty to leave that question to the jury, if I had been inclined so to do. I therefore told them, that if they were satisfied that the defendant published the pamphlet, and that the *innuendoes* added to different words in it by the indictment contained the true meaning of those words, they ought in point of law, to find him guilty. But that, if they were not satisfied on either of those points, they ought to acquit him.

“It is also true, that I gave no opinion myself, on the question, whether the pamphlet was a libel or not; for as the whole appeared upon the record, I thought it was the province of the court out of which the record came, and not of the judge at Nisi Prius, to decide that question.

2. “As to the other objection, it is likewise true, that I did not leave it to the jury to acquit the defendant, on the ground of its appearing by the advertisement, and the evidence given for him, that his intentions were innocent and not seditious. I thought the intention was an inference of law from the fact. I never entertained, or expressed, a doubt, but that there might be cases in which, although the publication were fully proved, yet the defendant might show that it was justifiable or excusable. But, where such a defence is set up, it must consist of matter of fact, and of matter of law:—

1. Of matter of fact, as to what was the true manner and occasion of the publication; 2. Of matter of law, viz. whether that manner and occasion made the publication, in point of law, justifiable or excusable. Where both those parts of a defence concur, I take it to be the duty of a judge to direct the jury, that though they should be satisfied that the publication was proved, yet that publication was no crime; and, therefore, they ought to acquit the defendant. But I did not think that the defendant’s saying, in this case, that he thought the pamphlet was not a libel, or his endeavoring, by an advertisement, to justify it on constitutional principles, afforded the semblance

¹ B. R. M., 11 G. 2, 5 Burr. 2661. The words were, “Guilty of the printing and publishing only.”

of a legal defence. For, as Lord HOLT says, 'If *a man speak treason, and say, God save the King, that will not save him.' [*87]

"However, if I was wrong in either of those points, I shall be very happy in having my error corrected by the Court."

The grounds and arguments upon which *Erskine* had founded his application for a new trial were to the following effect:

After premising a good many general observations on the evidence, and on what passed at the trial; and admitting that though he had (as he thought he had a right to do for the interest of his client) insisted that the verdict should be recorded in the words in which it was first delivered, yet the judge was not bound to record it in those words; he said, his objections were founded on five different propositions. The first and second were as follows:

"1. When a bill of indictment is found, or an information filed, charging any crime or misdemeanor known to the law of England, and the party accused puts himself upon the country by pleading the general issue, not guilty, the jury are *generally* charged with his deliverance from that *crime*, and not specially from the *fact* or *facts* in the commission of which the indictment or information charges the crime to consist: much less from any single fact, to the exclusion of others charged upon the same record.

"2. No act which the law in its general theory holds to be criminal constitutes in itself a crime, abstracted from the mischievous intention of the actor. And the intention, even where it becomes a simple inference of legal reason from a fact or facts established, may, and ought to be collected by the jury, with the judge's assistance: because the act charged, though established as a fact in a trial on the general issue, does not necessarily and unavoidably establish the criminal intention by any *abstract* conclusion of law: the establishment of the fact being still no more than full evidence of the crime, but not the crime itself; unless the jury render it so themselves by referring it voluntarily to the Court by special verdict."

After stating his second proposition he said,

Where a defendant puts himself on the jury, by pleading the general issue, and offers no defence, justification, or exculpation, the jury do right to infer, by common sense, the *guilt from the fact, unless where they doubt [*88] whether it follows by necessary inference, in which case they ought to put the facts upon the record, and leave the mere question of legal, or rather rational inference, to the Court. But the jury even in such cases may, that is, they have not only the *power*, but also a legal constitutional *right* to draw the inference themselves; a right intended to be exercised, by the founders of this constitution, as a guard against the corruption of fixed magistrates. In an action of trespass, the defendant cannot bring the validity of his justification before the jury: the Court will not permit it. But he may in all criminal cases; and this is the true reason why the general issue is the plea in all such cases, namely, that the criminality of the defendant's intent may be tried by his peers. If, in the present case, the judge had admitted the right, but had advised the jury to waive it, and leave the inference to the Court, by finding a special verdict, the defendant would not have moved for a new trial. There are cases where judges ought to take that course. But on the trial of this indictment, the judge excluded the right altogether.

It will be argued that the case of a libel is peculiar, and differs with respect to the province of the jury from other offences. My next proposition, therefore, is this:

"3. An indictment for a libel, even where the slander of an individual is the object of it, forms no exception to the jurisdiction or duties of juries, or the practice of judges, in other criminal cases. The argument for the difference,

viz. because the whole crime, in the case of libels, always appears upon the record, is false in fact, and even if true, would form no solid or substantial difference in law."

It is not true that the whole of the crime, in the case of libels, appears upon the record. May not part of the context, which might alter the whole complexion of the case, be omitted in the indictment? Is not the advertisement, which is a most material part of the publication, omitted in this indictment? Algernon Sidney, upon his trial, put a case very apposite to this point. He said that by taking Scripture "to pieces, you may make all the penmen of the Scripture blasphemous; you may accuse David of saying there is no God," 3 H. Tr. 808. Hargr. Ed. Suppose an indictment against a

[*89] *bookseller for printing and publishing a book containing those words. It could not be demurred to: yet such an indictment would not contain the whole of the charge; that is, it would not contain the whole of the publication. In such a case, could a judge tell the jury that they had nothing to do with the intent: that they were only to inquire whether the defendant published a libel containing the words stated in the record? Would it not be competent to the defendant to read the context, to show that he had only published the book of Psalms, and that his intention was not only innocent but laudable? So, in the present case, the advertisement was part of the context, omitted in the record, yet a material part of the act which is the ground of the prosecution, and necessary to be laid before the jury in evidence, to show the intent of the publication.

"4. The dialogue indicted, containing no slander of an individual, involved no question of law, the general tendency to excite sedition being a fact for the consideration of the jury."

But, supposing the Court should deny the legality of all those four propositions; or, admitting their legality, should resist the conclusion I have drawn from them, I shall then resort to my last proposition, viz.

"5. In all cases where the mischievous intention (which is agreed to be the essence of the crime), cannot be collected, by simple inference, from the fact charged, because the defendant goes into evidence to rebut such inference, the intention becomes a pure unmixed question of fact, for the consideration of the jury."

In support of the last proposition I rely on the opinion of this court, as delivered by Lord MANSFIELD in the case of *Rex v. Woodfall*, M. 11 Geo. 3, 5 Burr. 2661. His lordship there said, "Where an act, in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved and found; but, where the act is in itself unlawful, the proof of justification, or excuse, lies on the defendant; and, on failure thereof, the law implies a criminal intent," Ibid. 2667. The only thing in which I differ from that judgment is, that I hold the inference not to be an inference of law, but merely of reason and sense. His lordship, in the same case, said, [*90] "There may be cases where the fact proved as a publication may be justified, or excused, as lawful or innocent; for no fact which is not criminal,¹ in case the paper be a libel, can amount to a publication of which a defendant ought to be found guilty," 5 Burr. 2666. He then added, "But no question of that kind arose in this cause," Ibid. Why did no such question arise in that cause? His lordship had just given the reason. "On the part of the defendant, they called no witnesses," Ibid. 2665. Was that the case in the prosecution now under consideration? So, in the case of

¹ These are Lord MANSFIELD's words, as given in Burrow.

The expressions appear more clear and consistent as stated in Ridgway's edition of Erskine's speeches, "For no act which is not criminal, *though* the paper be a libel."

Rex v. Almon, M. 11 Geo. 3, 5 Burr. 2686, Lord MANSFIELD said, that evidence of the sale in the defendant's shop was, *prima facie*, evidence of a publication by him, which must stand good till answered; and that, if not answered at all, and believed, it was conclusive, 5 Burr. 2688. Mr. Justice ASTON expressed himself, on that occasion, to the same effect, viz. "that the *prima facie* evidence, if believed, was binding, till contrary evidence was produced," Ibid. 2689. In Rex v. Woodfall, Lord MANSFIELD did not say, "no fact which is not criminal can amount to a publication;" but, "no fact, &c., can amount to a publication of which a defendant ought to be found guilty." There were many circumstances, in the present defendant's case, which tended to show the innocence of his intention, and which ought to have been pointed out to the jury. The pamphlet was written by a near relation, a man appointed by his majesty to fill a very high judicial station. The advertisement explained the motives which induced the publication, but was insidiously left out of the indictment. Jones, the witness produced on the part of the defendant, proved that, in the declared opinion of the defendant, this pamphlet, which the judge did not say was or was not a libel, was perfectly innocent and legal. The evidence of character, also coupled with the rest, went not merely in mitigation, but ought to have been left as auxiliary proof of an innocent intent. The charge of the learned judge can only be supported *on one of two grounds; viz. 1. that the evidence produced was insufficient to show an innocent intent; or, 2. that the jury had [*91] nothing to do with the intent. But, on the first ground, though a strong recommendation to convict might be justified, yet it is impossible to hold that the evidence, such as it was, should not have been left to the jury. As to the second ground, if the jury had declared, "We find that the defendant published this pamphlet, whether a libel or not we do not find; and we find further, that believing it in his conscience to be meritorious and innocent, he *bona fide* published it with the prefixed advertisement, as a vindication of his character from the seditious intentions imputed to him, and not to excite sedition." Can it be said that on such a special verdict a judgment could have been given against the defendant? Such a position cannot be reconciled to the doctrine laid down by the Court in Rex v. Woodfall. The danger of the doctrine resulting from the learned judge's charge will not stop at the case of libels: it may extend to prosecutions for high treason; for the overt act of treason may be the publication of a written paper.

When Erskine had stated his grounds for the motion, Lord MANSFIELD desired he would furnish him with a copy of his five propositions, and said that they seemed to him reducible to two: viz. 1. That the jury not only have the power, but that where they choose, they ought to judge of the law; 2. That the defence was not sufficiently left to the jury as a justification.

Bearcroft, Cowper, Leycester, Bower, Manley, and Richards, showed cause.

They considered the grounds of the motion, contained in the five propositions stated by Erskine, as ranged under two general heads, according to what had fallen from Lord MANSFIELD, viz.

1. That there had been an actual misdirection of the judge, when he told the jury that the question, whether libel or not, was not for their decision.

2. That he had omitted to leave it to the jury, to acquit the defendant on the evidence given for him as proof of an innocent intent in the publication.

The substance of their arguments on those two heads was as follows:

1st HEAD. The direction given as to this head is consonant *to the uniform practice in former cases, and is founded on the best sense and the soundest principles. Whether libel or not, is a mere question of law; and, on that account, it has been the constant course for judges, when they

have had to try an indictment or an information for publishing a libel, to tell the jury, if they think the fact of the publication and the innuendoes are proved, to find the defendant guilty. It is almost peculiar to this offence that everything necessary to constitute the crime must be set forth on the record. The misapprehension or abuse of that principle has introduced a great deal of unnecessary introductory matter, in the common forms of such indictments and informations. The common preamble stating that the defendant, "being of a wicked and turbulent disposition, and intending to excite discontents, seditious, &c." is unnecessary, requires no evidence, contains mere inference of law, which the court must draw, and therefore need never be inserted. The epithets of false, wicked, seditious, and scandalous, applied to the libel, are equally inference of law, and of no use on the record.—[Lord MANSFIELD—"When I was Attorney-General, I left out the word 'false;' and I thought it had been omitted ever since in all crown prosecutions.""]—The only question of fact, in the case of a public libel like the present is, whether the defendant published the writing stated on the record in the sense given to it by the innuendoes, "of and concerning the king, and the government of the realm." If a libel is such a point of law, upon the face of it, without explanation, no innuendoes are necessary. If any parts are ambiguous, they must be explained by innuendoes, on the truth of which the jury is exclusively to decide. And, if the paper is in itself not libellous in the eye of the law, but became so by collateral facts and circumstances, those facts and circumstances must also be stated by averments on the record, and of the truth of such averments, the jury also are to judge. Therefore, in every case of libel, sufficient must appear on the record to enable the Court to see whether what is imputed to the defendant amounts in law, if true, to the crime for which he is brought to trial. But, whenever any objection, either to a criminal charge or a civil demand, arises on the face of the record, it is the universal impression of every lawyer, both on the bench and at the bar, that such objection is not a matter for discussion at *Nisi Prius*, but [93] ought to be stated *to the court who are to pronounce judgment, after the finding of the jury. As to their province, if they think the facts of the case proved, they may either find them specially, as this jury has done, or under the general expression of "guilty." That word was objected to as involving an opinion upon the law of the case; but it certainly only means that the jury think the defendant guilty, if there is a crime charged on the record. If the question, whether the matter stated on the record amounts to a libel, were not a mere matter of law, for the decision of the court, by what authority has the court so often arrested the judgment in prosecutions of this sort, on the ground that the subject of the charge was not a libel? If it is a mere matter of law, it ought not to be left to the determination of the jury. Good sense and sound reason exclude them from deciding upon the law. Chosen, as they are, by ballot, and not versed in the science of jurisprudence, how preposterous and dangerous would it be, if they were to take upon themselves to judge of intricate and abstruse legal questions. Upon the same question different juries would vary continually from one another, and instead of that certainty which is so necessary for the regulation of men's conduct, the law would constantly fluctuate, and nobody would be able to discover what it is, or where to find it.

And, on the other side, what is there to alarm or excite apprehensions in any rational mind, if the decision of the law which arises in trials of this sort is left to the judges. Do not they declare and expound the law in all other cases? The mixed jurisdiction of the court as to matters of law, and the jury as to questions of fact, has been established on the wisest principles. The criminal law of this country furnishes an instance of a judicature of a

nature still more complicated, which, however, in practice, is found to answer very salutary purposes. By the commission under which offences committed at sea are tried, under 28 H. 8, c. 15, the court is composed partly of common law judges, and partly of civilians; the facts are tried by a jury; the conduct of the trial is governed by the common law judge, according to the rules of the common law; but the civil law judge explains and defines the crime according to that law, and pronounces the sentence, if the prisoner is convicted. To be sure, in the case of a libel, if the jury choose, they may acquit the defendant by a general *verdict of not guilty, although the publication, averments, and *innuendoes*, should be fully proved. When [*94] they do so, they take the trial of the law, as well as of the fact, upon themselves.¹ But has it not been the constant practice, with all judges, when the question to be tried is made up of law and fact, to tell the jury, "if you believe the fact, you *must*, or you are *bound*, to find so and so?" Not bound by form or coercion, but by moral obligation, by their duty, and their oaths. They have the power to act otherwise, if they choose to set those considerations at defiance, because there are no means provided by the law for the punishment of a jury, in criminal cases, if they find a false verdict. It was formerly doubted whether an attain would not lie in such a case, but it is now settled that it would not.² The moral duty and obligation, however, is equally strong, as if it were enforced by a penal sanction. In the most compassionate cases, the directions of judges, that the law is compulsory on the jury, are never relaxed. Suppose such a case as really happened a few years ago were to come to be tried at the Old Bailey. An Irishman, who had three guineas in his pocket sealed up to be delivered to a friend in Ireland, was *impelled by hunger, and the immediate prospect of starving, to commit a highway robbery, considering this a less enormous crime [*95] than a breach of trust. In such a case, if in any, a judge ought to leave a free course to the compassion of the jury: yet will any lawyer deny, that in such a case it would be the duty of the judge to direct the jury, if the fact of the robbery were proved, that they must convict, and equally the duty of the jury to follow those directions? It was argued at the trial, and is again insisted on, that there is a difference between civil and criminal cases; and that, as in the latter, a defendant is not obliged to plead specially, everything is open to evidence and the consideration of the jury, which in a civil case must have been pleaded and referred to the opinion of the court. But to this the learned judge who tried the indictment gave the true answer, viz., that matter of law is not pleadable in any case. In that respect the law is the same in civil as in criminal cases; and, indeed, in civil cases, if the jury

¹ *Beacroft*, on this part of the argument, said, he agreed with the counsel for the defendant, that it is the right of the jury, if they please, on the plea of not guilty, to take upon themselves the decision of every question of law necessary to the acquittal of the defendant; and Lord MANSFIELD observing that he should call it the *power*, not the *right*, he adhered to the latter expression; and added, that he thought it an important privilege, and which, on particular occasions, as, for instance, if a proper censure of the measures of the servants of the crown were to be construed by a judge to be libellous, it would be laudable and justifiable in them to exercise. But he said that in conceding this right, he yielded nothing which would entitle the defendant to a new trial, for that the judge had not told the jury that if they believed the facts of the case, they could not find a verdict of not guilty.

The other counsel for the prosecution seemed to argue against the *right*, in the manner stated in the text.

² It is so laid down by Hawkins in express terms, Hawk. Pl. Cr. B. 1, c. 72, § 5, p. 191; but Lord HALK was of opinion, that for a false verdict of acquittal in a criminal prosecution, the king may have an attain, though no attain lies by the defendant for a false verdict of guilty, 2 Hal. H. Pl. Cr. p. 310, which opinion is adopted by BLACKSTONE, J., in his Commentaries, 4 Blackst. Comm. 361.

will take the law upon them, there is as little redress as when they do so in criminal cases : they are equally incoercible in both instances; for corruption only can be a ground for an attain; not mistake or ignorance. Suppose in an action of *assumpsit* on a promise arising by implication of law, the jury should, absurdly, but innocently, insist on proof of an actual undertaking, and for want of such proof should find for the defendant. There is no remedy or check in such a case, but for the court to set aside the verdict, and grant a new trial; and that practice is but of modern date.¹ Yet it seems admitted, that, in civil cases, the jury have not the right, though, in the instance put, they certainly would have the power, to take the decision of the law upon themselves. It was said at the trial, "That it is impossible, in most criminal cases, to separate law from fact; and that consequently, whether a writing be or be not a libel, never can be an abstract legal question for the judges; that this position is proved by the immemorial practice of *courts, the forms of which are founded in legal reason," (folio [*96] account of the trial, p. 34). But, if legal forms are taken into consideration, they will be found to militate strongly against the argument on the part of the defendant. It has already been observed, that it is almost peculiar to indictments and informations for libels, that everything necessary to constitute the crime must appear on the record. In common cases, the crime is only charged by general words and description, as the result and conclusion in law of what is to be proved in detail to the jury by an investigation of the particular facts. So it is in the cases of murder, burglary, robbery, and other felonies. What the particular facts are is not stated on the record. The Court therefore cannot see whether they are such as, if proved, will justify the inference, and constitute the crime charged. They must therefore wait till the trial, and the jury and judge then inquire together into the law and the fact; and, from both, determine whether the party has been guilty of the crime imputed to him. But, in the case of a libel, the particulars which go to constitute the crime, and especially the writing itself, are specifically set out. Thus in the present case, if the indictment had only charged, that the defendant published a certain libel, entitled, "The principles of government in a dialogue between a gentleman and a farmer," it would have been insufficient: yet that would have been notice to the defendant. But it was necessary to set out the words charged as criminal, *verbatim*. This was the solemn and unanimous opinion of all the judges, delivered to the House of Lords in Dr. Sacheverel's trial, though that house resolved, that by the law and usage of parliament in prosecutions by impeachment, the particular words supposed to be criminal are not necessary to be specified, St. Tr. Hargr. Ed. vol. 5, p. 828. For what other purpose are they necessary to be specified in proceedings by indictment or information, but that the court may judge whether what is charged, if true, amounts to a crime or not? If that were within the province of the jury, they might collect it equally well from the evidence. But it was said (folio trial, p. 34), why is the libel read, and often delivered to the jury, if they are not to judge of its [*97] tendency? The answer is plain: It is done that they may *judge of the propriety and truth of the *innuendoes*.

As to the case mentioned to have been stated by Algernon Sidney, and adduced to show that the whole writing may not be put upon the record, and

¹ If a jury were to find *contrary to the law*, as stated by the judge in a civil case, from *corrupt motives*, which is a very possible case, it seems that they would be liable to attain as much as for finding corruptly against evidence. This is expressly so stated by Lord VAUGHAN, in Bushel's case, Vaugh. 148, et seq. The words of Westm. 2, c. 80, seem to show the same thing. *Sed si sponte velint dicere quod dissertina est vel non, admittatur eorum veredictum sub suo periculo.*

that a part of the context material to show the defendant's innocence may be omitted, the answer is plain. The charge could not be proved. It would appear, on the evidence, that the bookseller had never published such a proposition. So, if, by the omission of a word, from a mistake in the printer, an innocent passage should seem to bear a criminal meaning, and an indictment or information were framed upon it; on evidence of the omission, it would appear that the defendant had never published the criminal matter charged. A man could as little be convicted, in such a case, as if, having a libel written by another in his pocket, for the purpose of suppressing it and preventing its publication, he were to pull it out by accident with his handkerchief, and drop it, and thereby innocently become the means of its being published; or being a clergyman, like the defendant, should mistake it for his sermon, and in a fit of absence deliver it from the pulpit. Here it is that the maxim of *Nemo est reus, nisi mens sit rea*, applies. Consonant to the doctrine of the learned judge at the trial, viz., that matter of fact only is for the determination of the jury, and that the law arising upon the facts is to be decided by the Court, is what is laid down in Dowman's case, C. B. E., 23 Eliz. 9 Co. 12, b. "The common law," it is there said, "hath ordained, that matters of fact shall be tried by jurors, and matters in law by the judges; for as, *Ad quæstionem facti non respondent iudices*, so, *ad quæstionem juris non respondent juratores*. Their duty is to find the truth of the fact, and to refer the discussion of the law to the justices," 9 Co. 12, b; and the reason there given for excluding the jury from the decision of matters of law is, in other words, what has been stated in a former part of this argument, viz., "*Quod quisque nōrit, in hoc se exerceat*," 9 Co. 13. The same distinction between the provinces of judges and juries is repeated, and almost in the same words, in two different parts of Coke upon Littleton: Co. Litt. 155, b, 226, a. Bushell's case, C. B. M., 22 Car. 2, Vaugh. 135, was much relied on at the trial, Folio Trial, p. 35, and the following passage, particularly, cited from Lord VAUGHAN'S *judgment in that case: "We must take off this veil and color of words, which make a show of [*98] being something, but are in fact nothing. If the meaning of those words, '*finding against the direction of the Court in matter of law*,' be, that if the judge, having heard the evidence given in court (for he knows no other), shall tell the jury, upon this evidence, the law is for the plaintiff or for the defendant, and you, under the pain of fine and imprisonment, are to find accordingly, every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong; and, therefore, the trials by them may be better abolished than continued, which were a strange and new-found conclusion, after a trial so celebrated for many hundred years," Vaugh. 143. But this passage, thus taken by itself, seems to carry a sense different from the clear meaning of the judgment, when considered altogether. The commitment appears to have been, not solely for disregarding the direction of the Court in matter of law, but because the jury had drawn a conclusion in point of fact from the evidence contrary to the wishes of the Court; and that the judgment by which Bushell was discharged was founded in a great measure on that circumstance, appears from a great part of the argument reported by Lord VAUGHAN, and particularly from the passage immediately following that just cited. "For, if the judge, *from the evidence*, shall, *by his own judgment*, first resolve, upon any trial, *what the fact is*, and so, knowing the fact, shall then resolve *what the law is*, and order the jury, penally, to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all?" Vaugh. 143. That is an observation to which everybody must yield assent. But observe what follows almost immediately after. "And this is ordinary,

when the jury find unexpectedly for the plaintiff, or defendant, the judge will ask, 'How do you find such a fact in particular?' And upon their answer he will say, 'Then it is for the defendant,' though they found for the plaintiff, or *à contrario*; and thereupon they rectify their verdict," Vaugh.

144. What, therefore, that case was cited to prove illegal, is there recognised, without censure or disapprobation, as the ordinary practice of all judges. The only *peculiarity in the present case is that, as the whole [*99] was upon the record, it was not necessary for the learned judge at the trial to deliver any opinion to the jury on the matter of law, as must be done in actions of assumpsit, ejectment, and others of that sort. Where a decision is unnecessary, it seems to be the most laudable course for the judge to avoid giving a hasty opinion at Nisi Prius, in cases of importance, and leave the law to the more solemn determination of the full Court, to which the record is to return. This is inculcated in Dowman's case, where it is said, that the law will not compel justices of assize upon the sudden to decide questions in law, be it in pleas of the crown or common pleas; but in such case to have the truth of the case found, and upon conference and consideration to adjudge according to the law in such cases, 9 Co. 13. To proceed now to the express authorities applicable to the present case. It may be proper to premise some cases antecedent to the Revolution, not because they are of very particular weight, but to show the antiquity of that doctrine, in point of practice, which has been fully established in Lord COKE's time in theory and principle. In Lilburne's case, 1649, 2 St. Tr. Hargr. Ed. 19, who was indicted for a certain traitorous publication, and tried upon the plea of not guilty, Lord KEBLE stated it expressly as the opinion of the Court, "that the jury were not judges of the matter of law," 2 St. Tr. 69. So in Keach's case, 16 Car. 2, 2 St. Tr. 549, Lord Chief Justice HYDE would not permit the defendant to argue upon the innocence of the book for the publication of which he was tried, telling him "that he must only speak to the matter of fact, that is to say, whether he wrote the book or not," 2 St. Tr. 552; and in like manner, in Samuel Johnson's case, 2 Jac. 2, 7th St. Tr. 645, who was tried on an information in the Court of King's Bench for writing, printing, and publishing two seditious libels; when in his defence he proceeded to intimate, that "he hoped, seeing he was charged with writing, printing, and publishing seditious libels, the jury would consider whether those papers they had heard read were so or no;" the Court told him, "that the jury ought to consider it only as to the matter of fact, whether he was guilty of writing or publishing them, &c., and that the rest lay in the breast of *the Court to consider," 7 St. Tr. 646. Such was the estab- [*100] lished judicial practice before the Revolution. The case of the seven bishops is a single instance to the contrary; for there the question of libel or no libel was left to the jury, and they found a verdict of not guilty, contrary to the opinion delivered by the majority of the Court. That verdict contributed so much to the freedom of this constitution, that it is difficult to speak of it but with reverence; but it is anomalous, and cannot stand as an authority against the uniform current of prior and subsequent cases. Let

¹ A case of the same sort, much earlier than any of the above, is to be found in the State Trials, viz., Udall's case, 32 El. 1 St. Tr. 167, who was tried on a charge of felony by the statute of 23 El. c. 2, for writing a malicious libel against the queen. The judge there told the jury, "that they should not need to trouble themselves to find him guilty of the felony, but only it was sufficient if they found him guilty to be the author of the book; for, quoth he, it is already determined by all the judges of the law, that the author of that book was in the compass of the statute of felony; and this, quoth he, was concluded before we came hither. Therefore you, being ignorant of the law, and we being sworn, as well as you are, you are to hear us, and to take our exposition of the law." 1 St. Tr. 176.

us see what the subsequent cases are, and which have happened in quieter times. In Tutchin's case, 3 Ann. 5 St. Tr. 527, though there are expressions in Lord HOLT's charge to the jury which may seem to leave the consideration of the question of libel to them, he concludes in these remarkable words: "If you are satisfied that he is guilty of composing and publishing these papers at London, you are to find him guilty,"¹ 5 St. Tr. 542. The next case to be found in print is that of *Rex v. Clarke*, 25 Feb. 1729. 9 St. Tr. 273, note, which was a trial upon an information for printing and publishing a libel called *Mist's Weekly Journal*, No. *175, before Lord RAYMOND, at Guildhall. The libel is stated to have contained, under [*101] certain fictitious characters, many scandalous reflections and odious comparisons, between George II. and the Pretender. Clarke was the pressman in the printing office, and his counsel urged, "that being a poor ignorant workman, he could not be supposed to understand the comparisons, or to know the characters, nor could have any malicious intention against the government." But to this Lord RAYMOND answered, "That it was the fact of printing and publishing *only* that lay in issue," 9 St. Tr. *loc. cit.* Soon afterwards came the case of *Rex v. Franklin*, 3 Dec. 1781. 9 St. Tr. 255, also before Lord RAYMOND; and, on that occasion, he stated the law in the most explicit terms. "In this case," said he to the jury, "there are three things to be considered; whereof two by you the jury, and one by the Court. The first thing under your consideration is, whether the defendant is guilty of the publication or not; the second is, whether the expressions refer to his present majesty, and his principal officers and ministers of state, and are applicable to them or not. These are the two matters of fact that come under your consideration, and of which you are the proper judges. But then there is a third thing, to wit, whether the defamatory expressions amount to a libel or not. This does not belong to the office of the jury, but to the office of the Court; because it is a matter of law, and not of fact, and of which the Court are the only proper judges; and there is redress to be had at another place if either of the parties are not satisfied. For we are not to invade one another's province, as is now of late a notion among some people who ought to know better; for matters of law and matters of fact are never to be confounded."² 9 St. Tr. 275. The next case was in 1752, viz., *Rex v. Owen*, 6 July, 1752; 10 St. Tr. Append. 195, which was tried at Guildhall, before LEE, *C. J.; and there his direction to the jury, though, as [*102] stated in the printed account of the trial, it is shorter in words, was to the same purport and effect with Lord RAYMOND's in the case of *Franklin*; for he told the jury, that he thought the fact of publication was fully proved, "and if so they could not avoid bringing in the defendant guilty," 10 St. Tr. Append. 208. These are solemn opinions and directions, by judges eminent for learning and integrity, and their opinions, in none of the cases which have been just cited, were ever questioned or brought into review elsewhere. But in the case of *Rex v. Woodfall*, in 1770, Lord MANSFIELD having laid

¹ "These words have immediate reference to the ground of defence on which Tutchin's counsel meant to rely; namely, that the offence had not been proved to be committed in London (the *writing* not being proved there, only the *publishing*); and cannot be considered to be used for the purpose of withdrawing the attention of the jury from the quality of the publication upon which they had just before received instructions: and, indeed, to suppose it had so meant, would be to prove too much; since, if so, the jury were directed not to find the truth of the *innuendoes*." Starkie, 621.

² Lord RAYMOND in this case gave no formal opinion at the trial whether the writing was, in point of law, a libel. He only said, when directing the jury as to the *innuendoes*, "and if the defamatory expressions mean his majesty and his principal officers and ministers of state, I must say they are very scandalous and reflecting expressions, because they charge them with perfidy in breaking of treaties, ruining in a manner their country, &c., as you may see at large in the letter."

down the law in the same manner, the case came before the Court; and on that occasion his lordship stated the directions he had given, and particularly "that he had told the jury, as he had from indispensable duty been obliged to tell every jury upon every trial of that kind, that whether the paper was a libel, was a question of law on the face of the record; and that if they agreed with the meaning put on the paper by the *innuendoes*, and believed the evidence as to the publication, they ought to find the defendant guilty," 5 Burr. 2666. His lordship then concluded thus: "That the law, as to the subject-matter of the verdict, is as I have stated, has been so often unanimously agreed by the whole Court, upon every report I have made of a trial for a libel, that it would be improper to make it a question now in this place. Among those that concurred the bar will recollect the dead,¹ and the living not now here.* And we all again declare our opinion, that the direction is right and according to law," 5 Burr. 2668. Here then is the solemn and unanimous judgment and assent of the Court of King's Bench, to a doctrine, which, if it can be impugned with success at this period of time, authority, decision, and precedent, ought to be no longer in the mouth of any lawyer.

2d HEAD. The first four propositions laid down, when the rule was moved for, falling within the foregoing general head of objection, it remains to consider the second head, to which the 5th and last proposition is pointed. Upon this part of the case, a great deal of confusion arises, because there is [103] *no precise meaning affixed to the word *intention*, nor any accuracy observed as to the subject to which it is applied. Intention is either express or implied. Express or actual intention, in the case of a crime charged, as on this indictment, is only to be considered as to the publication. It is no part of the charge, that the defendant did the act imputed to him, *with an intent to raise seditious, &c.* In such a case, as express intent would make a substantive part of the charge, it must be proved, and left to the jury, otherwise they ought to acquit the defendant. But the words "*intending to raise seditious, &c.*", which are what are used here, are, as has been said in a former part of the argument, words merely expressive of the implied intention, which the law infers, without proof, from the publication of the libel set forth. No distinction is better established than the difference between introductory matter of this kind and the charge of actual intent, as constituting a substantive part of the offence. An indictment charging "that A, *intending to murder B.*, with force and arms made an assault upon him," is essentially different from a charge "that A. made an assault on B. *with intent to murder him.*" According to this distinction, the only intent in the present case which the jury had to consider, was that intent which regarded the publication of the paper. If the defendant meant to publish, he is answerable for the consequences. He shall not afterwards be permitted to say, "I did not mean that it should do harm; I did not think it would. I published it with a wish and view to do public good, and serve my country." If in the eye of the law it is a libel, this sort of defence cannot be received, for *ignorantia juris neminem excusat*. It was asked, what would be the effect of a verdict which, on such an indictment as this, should find in express words that the defendant published the paper, *bonâ fide*, with an intent of vindicating his character? This question may be answered by another, viz., Would it serve to acquit a man indicted for the murder of a custom-house officer, by resisting him, when exercising his duty in the seizure of prohibited goods, if it were shown in evidence, or found by the jury, that the officer had first used violence, and that the prisoner did not know that the goods were contraband? Certainly not. In cases of forgery the party often means to keep within the letter of the law, and thinks he has so done; but was it

¹ Probably DENNISON, J.

² YATES, J.

ever left to the jury to consider whether he thought so, or not? *Sup-
 pose a man breaks a house in the night, and he proves that he was [*104]
 taught by a preacher that such an act was no crime, and not against law, and
 the jury should even believe that he had *bonâ fide* adopted that opinion, he
 would nevertheless have no right to be acquitted. Suppose a person at the
 head of an armed body of men should proceed to the house of parliament
 with a design to compel them, by intimidation, to repeal a statute, such an
 act would clearly be high treason, *Rex v. Lord Geo. Gordon*; nor would it
 cease to be high treason, though it could be shown that the leader and his
 followers did not think it did amount to treason or crime, but believed it to
 be highly meritorious. If a man strikes another with a deadly weapon, or
 in a duel fires a pistol at him, it will not cease to be murder because he may
 say, or even satisfy a jury, that he did not mean to kill the deceased; that
 he did not know him; that he fired at him to vindicate his honor. In all
 those cases, the only question of intention is, Did you mean to strike the
 blow? Did you mean to fire the pistol? &c. In short, the fallacy consists
 in the misapplication of the principle already mentioned, viz., "*Actus non facit
 reum, nisi mens sit rea.*" Intention to commit the crime is certainly of the
 essence of the crime; but in a case like the present, the publication of the
 paper is the crime, and all that is essential in respect of intention is the in-
 tention to publish it. It is neither necessary for a prosecutor to show (that
 is admitted), nor is it any defence to disprove, an intent to produce mis-
 chievous consequences. If the law says the paper has that tendency, it is a
 libel; the defendant chose to run the risk; he acted *suo periculo*, and must
 take the consequences. This is fully explained in *Lord RAYMOND's* charge
 to the jury in *Rex v. Franklin*. His words are these: "There was one thing
 more mentioned by the defendant's counsel, which was, that there is no room
 to think the latter libellous, because there could be no malice supposed, by
 inserting it in the *Craftsman*, being only designed as a piece of foreign news;
 and that the latter part of the letter qualifies it, by saying that the letter-
 writer does not take upon him to justify the truth of the report. But that
 will not do, for the injury is the same to the person scandalized, whether the
 letter was inserted out of malice or not. Besides, there is no knowing or
 proving particular malice, otherwise than from *the act itself; and
 therefore if the act imports as much, it is sufficient," 9 St. Tr. 279. [*105]
 In another case, two years before, the same judge declared, if possible, a still
 stronger opinion on this point. *Rex v. Nutt*, H. 2 Geo. 2, Fitzg. 47, was an
 information against a woman who kept a pamphlet shop, for publishing a
 treasonable libel. Upon the evidence it appeared, that the libel was sold in
 the defendant's shop, by her servant, for her use and account; but that it
 was sold in her absence, and that she did not know of its contents, nor of its
 coming in or going out. Lord RAYMOND, observing upon this evidence of
 her ignorance, said, "The defendant, notwithstanding, is guilty of publishing
 this libel, the shop being kept under her authority and direction. It would
 be of very dangerous consequence if the law were otherwise: it has been so
 ruled in a great many instances." And her counsel putting this case, "If a
 post-boy should carry a libel sealed up, must he be punished for it?" his lord-
 ship answered, "There the question would be, whether such carrying by a
 post-boy should be deemed in law a publication; and in all those cases the
 mischief is equal, though the party's intention do not concur, Fitzg. 48." If
 we look to an earlier period, we shall find that the same doctrine was held
 before the Revolution; for in the case of *Rex v. Harris*, 32 Car. 2, 2 St. Tr.
 1037, when it was urged by the defendant's counsel that a malicious design
 to scandalize the king and the government was a material part of the infor-
 mation, and that from the evidence it appeared, that the defendant had sold

the libel merely in the common course of his trade, and to get a profit, the Chief Justice held that proof of the publication was sufficient ground for a conviction.

So in another case it was held to be no defence to a prosecution for a libel against the government, that the author declared in his preface, that he meant it for the benefit of the government, and concluded the preface with "God save the King."

What was said by the Court in the cases of *Rex v. Woodfall*, and *Rex v. Almon*, has been relied on as decisive on the present head. But the inference drawn from those cases is by no means justified by the language of Lord MANSFIELD. It is clear that his lordship in those cases meant [*106] only to say, that though the fact of selling by the defendant's servant is *prima facie* evidence of a publication by the defendant, yet that evidence of that sort may be rebutted by contrary proof. This goes, therefore, merely to the intent to publish, and is consistent with the distinction which has been endeavored to be established on this head, and with the former cases and authorities, and it is here particularly that the case put by Algernon Sidney is applicable. The evidence of the context in that case would show, that the defendant never meant to publish the abstract proposition imputed to him; and this was so clear, and so well understood at that time, that when Mr. Sidney put the case, the Chief Justice said to him, "Look you, Mr. Sidney, if there be any part of it (i. e. the writing for which he was tried) that explains the sense, you shall have it read," 3 St. Tr. 808. Now, to apply the argument, what was the evidence in the present case? Did it tend to disprove the intent to publish? On the contrary, does not the whole, taken together, show a most deliberate design of publishing? Is it evidence of such facts as, if special pleading were required, would, if put upon record, amount to a justification, and rebut the charge of a criminal publication? Certainly not. Every lawyer must see, that, consistent with the principles which have been just laid down and established on this head, such a plea would have been bad upon a general demurrer. If so, instead of there being a ground to say that it should have been left to the jury to acquit the defendant upon the evidence given for him, it should rather seem that in strictness the judge did wrong in permitting the evidence to be given. At all events the Court will never send back this case to a new trial merely to give an opportunity of leaving the evidence to a new jury as matter tending to an acquittal, to which they cannot give that effect, without violating their duty, and committing, *in foro conscientie*, gross and palpable perjury.

Erskine, in support of the rule.¹

In following the objections of so many learned persons, offered in different arrangements upon a subject so complicated and comprehensive, there is much danger in being drawn from that method and order which can alone [*107] fasten conviction upon unwilling minds, or drive them from the shelter which ingenuity never fails to find in the labyrinth of a desultory discourse.

The sense of that danger, and the difficulty of struggling against it, was the reason why certain written and maturely considered propositions were delivered to the Court when the motion for a new trial was made, and a resolution formed not to depart or be removed from the establishment of those propositions, either in substance or in order, in any stage of the proceedings, and by which, therefore, the rule for a new trial must unquestionably stand or fall.

Pursuing this system, the case of the defendant is vulnerable in two ways,

¹ The speech in support of the rule was published by Lord ERSKINE's authority, before the Libel Bill, 82 Geo. 3, c. 60, was brought in by Mr. Fox.

and in two ways only. Either it must be shown that the propositions are not valid in law, or, admitting their validity, that the learned judge's charge to the jury at Shrewsbury was not repugnant to them : there can be no other possible objections to the application for a new trial.

The duty, therefore, of the defendant's counsel is obvious and simple ; it is, first, to re-maintain those propositions ; and then to show, that the charge delivered to the jury at Shrewsbury was founded upon the absolute denial and reprobation of them.

The first two propositions, though worded with cautious precision, and in technical language, to prevent the subtlety of legal disputation in opposition to the plain understanding of the world, neither do nor are intended to convey any other sentiment than this, viz., that in all cases where the law either directs or permits a person accused to throw himself upon a jury for deliverance by pleading, *generally*, that he is not guilty, the jury, thus legally appealed to, may deliver him from the accusation by a general verdict of acquittal founded (as in common sense it evidently must be) upon an investigation as general and comprehensive as the charge itself from which it is a general deliverance.

Having said this, it is extremely difficult to find any further illustration of the subject ; because there is not any matter by which it might be further illustrated, so clear, or so indisputable, either in fact or in law, as the very proposition itself which upon this trial has been brought into question.

One who looks back upon the ancient constitution, and examines with painful research the original jurisdictions of *the country*, will be [108] utterly at a loss to imagine from what sources these novel limitations of the rights of juries are derived. Even the bar is not trained to the discipline of maintaining them. Mr. Bearcroft solemnly abjures them : he now repeats what he avowed at the trial, and is even jealous of the imputation of having meant less than he expressed ; for, when speaking now of the *right* of the jury to judge of the whole charge, your lordship corrected his expression, by telling him he meant the *power*, and not the *right* ; he caught instantly at your words, disavowed your explanation, and declared his adherence to his original admission in its full and obvious extent. "I did not mean," said he, "merely to acknowledge that the jury have the *power*, for their power nobody ever doubted ; and if a judge was to tell them they had it not, they would only have to laugh at him, and convince him of his error, by finding a general verdict, which must be recorded : I meant, therefore, to consider it as a *right*, as an important privilege, and of great value to the constitution."

Thus we are perfectly agreed. Nothing more was ever contended for on the part of the defendant than he has voluntarily conceded ; for his concession amounts expressly to what was stated when this rule was applied for, viz., that the jury have not merely the *power* to acquit, upon a view of the whole charge, without control or punishment, and without the possibility of their acquittal being annulled by any other authority ; but that they have a *constitutional legal right to do it*,—a *right fit to be exercised*, and intended by the wise founders of the government to be a protection to the lives and liberties of Englishmen against the encroachments and perversions of authority in the hands of fixed magistrates.

But as what fell from your lordship gives no reason to expect a ratification of this principle from the Court, it will be necessary to establish it by argument and authority.

It is not very usual, in an English court of justice, to be driven back to the earliest history and original elements of the constitution, in order to establish the first principles which mark and distinguish English law : they

are always assumed, and, like axioms in science, are made the foundations of reasoning, without being proved. Of this sort our ancestors, for many centuries, must have conceived the right of an English jury to decide upon [*109] every question which the *forms of the law submitted to their final decision; since, though they have immemorially exercised that supreme jurisdiction, we find no trace in any of the ancient books of its ever being brought into question.

It is but as yesterday, when compared with the age of the law itself, that judges, unwarranted by any former judgments of their predecessors, without any new commission from the crown, or enlargement of judicial authority from the legislature, have sought to fasten a limitation upon the rights and privileges of jurors, totally unknown in ancient times, and palpably destructive of the very end and object of their institution.

No fact is of more easy demonstration; for the history and laws of a free country lie open even to vulgar inspection.

During the whole Saxon era, and even long after the establishment of the Norman government, the whole administration of justice, criminal and civil, was in the hands of the people themselves, without the control or intervention of any judicial authority, delegated to fixed magistrates by the crown. The tenants of every manor administered civil justice to one another in the court-baron of their lord; and their crimes were judged of in the leet; every suitor of the manor giving his voice as a juror, and the steward being only the registrar, and not the judge.

On appeals from these domestic jurisdictions to the county-court, and to the torn of the sheriff, or in suits and prosecutions originally commenced in either of them, the sheriff's authority extended no farther than to summon the jurors, to compel their attendance, ministerially to regulate their proceedings, and to enforce their decisions; and even where he was specially empowered by the king's writ of justices to proceed in causes of superior value, no judicial authority was thereby conferred upon himself, but only a more enlarged jurisdiction ON THE JURORS who were to try the cause mentioned in the writ.

It is true the sheriff cannot now intermeddle in pleas of the crown; but with this exception, which brings no restrictions on juries, these jurisdictions remain untouched at this day: intricacies of property have introduced other forms of proceeding, but the constitution is the same.

This popular judicature was not confined to particular districts, or to inferior suits and misdemeanors; but pervaded the whole legal constitution; [*110] for when the conqueror, *to increase the influence of his crown, erected that great superintending court of justice in his own palace, to receive appeals criminal and civil from every court in the kingdom, and placed at the head of it the *capitalis justiciarius Angliæ*, of whose original authority the chief justice of this court is but a partial and feeble emanation; even that great magistrate was in the *aula regis* merely ministerial; every one of the king's tenants who owed him service in right of a barony had a seat and a voice in that high tribunal; and the office of justiciar was but to record and to enforce their judgments.

In the reign of King Edward the First, when this great office was abolished; and the present courts at Westminster established by a distribution of its powers, the barons preserved that supreme superintending jurisdiction which never belonged to the justiciar, but to themselves only as the jurors in the king's court; a jurisdiction which, when nobility, from being territorial and feudal, became personal and honorary, was assumed and exercised by the peers of England; who, without any delegation of judicial authority from the crown, form to this day the supreme and final court of English law, judging

in the last resort for the whole kingdom, and sitting upon the lives of the peerage, in their ancient and genuine character, as the pares of one another.

When the courts at Westminster were established in their present forms, and when the civilization and commerce of the nation had introduced more intricate questions of justice, the judicial authority in civil cases could not but enlarge its bounds; the rules of property in a cultivated state of society became, by degrees, beyond the compass of the unlettered multitude, and, with certain well-known restrictions, undoubtedly fell to the judges; yet more, perhaps, from necessity than by consent; as all judicial proceedings were artfully held in the Norman language, to which the people were strangers.

Of these changes in judicature, immemorial custom, and the acquiescence of the legislature, is the evidence which establish the jurisdiction of the Court on the true principles of English law, and measure the extent of it by their ancient practice.

But no such evidence is to be found of any the least relinquishment or abridgment of popular judicature in cases of crimes; on the contrary, every page of our history *is filled with the struggles of our ancestors for its preservation. [*111]

The law of property changes with new objects, and becomes intricate as it extends its dominion; but crimes must ever be of the same easy investigation: they consist wholly in intention, and the more they are multiplied by the policy of those who govern, the more absolutely the public freedom depends upon the people's preserving the entire administration of criminal justice to themselves.

In a question of property between two private individuals, the crown can have no possible interest in preferring the one to the other; but it may have an interest in crushing both of them together, in defiance of every principle of humanity and justice, if they should put themselves forward in a contention for public liberty against a government seeking to emancipate itself from the dominion of the laws. No man in the least acquainted with the history of nations, or of his own country, can refuse to acknowledge, that if the administration of criminal justice were left in the hands of the crown or its deputies, no greater freedom could possibly exist than government might choose to tolerate from the convenience or policy of the day.

This important truth is no new discovery or assertion for the purpose of this cause, but is to be found in every book of the law: whether we go up to the most ancient authorities, or appeal to the writings of men of our own times, we meet with it alike in the most emphatical language. Mr. Justice BLACKSTONE, by no means biassed towards democratical government, having in the third volume of his Commentaries explained the excellence of the trial by jury in civil cases, expresses himself thus (vol. 4, p. 349): "But it holds much stronger in criminal cases; since, in time of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of presentment and trial by jury, between the liberties of the people and prerogative of the crown. Without this barrier, justices of oyer and terminer named by the crown might, as in France or in Turkey, imprison, dispatch, or exile any man that was obnoxious to government, by an instant declaration that such *was their will and pleasure. So that the liberties of England cannot but subsist so long as the palladium remains [*112] sacred and inviolate, not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations which may sap and undermine it."

But neither was this remark, though it derives new force in being adopted by so great an authority, original in Mr. Justice BLACKSTONE. For the same express reason for the institution and authority of juries is to be found in Bracton, who wrote above five hundred years before him. "*The curia pares*," says he, "were necessarily the judges in all cases of life, limb, crime, and disherison of the heir *in capite*. The king could not decide, for then he would have been both prosecutor and judge; neither could his justices, for they represent him."

Notwithstanding all this, the learned judge was pleased to say at the trial, that there was no difference between criminal and civil cases. But upon a discussion of the subject it will be found that, independent of these authorities, there is not, even to vulgar observation, the remotest similitude between them.

There are four capital distinctions between prosecutions for crimes and civil actions; every one of which deserves consideration.

First, in the jurisdiction necessary to found the charge.

Secondly, in the manner of the defendant's pleading to it.

Thirdly, in the authority of the verdict which discharges him.

Fourthly, in the independence and security of the jury from all consequences in giving it.

As to the first, it is unnecessary to remind the Court that, in a civil case, the party who conceives himself aggrieved states his complaint to the Court, avails himself at his own pleasure of its process, compels an answer from the defendant by its authority, or taking the charge *pro confesso* against him on his default, is entitled to final judgment and execution for his debt, without any interposition of a jury. But in criminal cases it is otherwise; the Court has no cognisance of them without leave from the people forming a grand inquest. If a man were to commit a capital offence in the face of all the judges of England, their united authority could not put him upon his trial: they could file no complaint against him, even upon the records of the [113] *supreme criminal court; but could only commit him for safe custody, which is equally competent to every common justice of the peace: the grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it.

If it shall be said, that this exclusive power of the grand jury does not extend to lesser misdemeanors, which may be prosecuted by information, the answer is, that for that very reason it becomes doubly necessary to preserve the power of the other jury which is left.

But in the rules of pleading there is no distinction between capital and lesser offences; and the defendant's plea of not guilty (which universally prevails as the legal answer to every information or indictment, as opposed to special pleas to the Court in civil actions), and the necessity imposed upon the crown to join the general issue, is absolutely decisive of the present question.

Every lawyer must admit, that the rules of pleading were originally established to mark and to preserve the distinct jurisdictions of the Court and the jury, by a separation of the law from the fact, wherever they were intended to be separated. A person charged with owing a debt, or having committed a trespass, &c., &c., if he could not deny the facts on which the actions were founded, was obliged to submit to the Court his justification for matter of law by a special plea upon the record; to which plea the plaintiff might demur, and submit the legal merits to the judges. By this arrangement, no power was ever given to the jury, by an issue joined before them, but when a right of decision as comprehensive as the issue went along with

it: for, if a defendant in such civil actions pleaded the general issue, instead of a special plea, aiming at a general deliverance from the charge, by showing his justification to the jury at the trial, the Court protected its own jurisdiction, by refusing all evidence of the facts on which such justification was founded.

The extension of the general issue beyond its ancient limits, and in deviation from its true principle, has introduced some confusion into this simple and harmonious system; but the law is substantially the same.

No man, at this day, in any of those actions where the ancient forms of our jurisprudence are still wisely preserved, *can possibly get at the opinion of a jury upon any question not intended by the constitution [*114] for their decision. In actions of debt, detainue, breach of covenant, trespass, or replevin, the defendant can only submit the mere fact to the jury; the law must be pleaded to the Court: if, dreading the opinion of the judges, he conceals his justification under the cover of a general plea, in hopes of a more favorable construction of his defence at the trial, its very existence can never even come within the knowledge of the jurors; every legal defence must arise out of facts, and the authority of the judge is interposed to prevent their appearing before a tribunal, which, in such cases, has no competent jurisdiction over them.

By imposing this necessity of pleading every legal justification to the Court, and by this exclusion of all evidence on the trial beyond the negation of the fact, the courts indisputably intended to establish, and did in fact effectually secure, the judicial authority over legal questions from all encroachment or violation; and it is impossible to find a reason in law, or in common sense, why the same boundaries between the fact and the law should not have been at the same time extended to criminal cases by the same rules of pleading, if the jurisdiction of the jury had been designed to be limited to the fact, as in civil actions.

But no such boundary was ever made or attempted; on the contrary, every person charged with any crime by an indictment or information has been at all times, from the Norman conquest to this hour, not only permitted, but even bound, to throw himself upon his country for deliverance, by the general plea of not guilty; and may submit his whole defence to the jury, whether it be a negation of the fact, or a justification of it in law; and the judge has no authority, as in a civil case, to refuse such evidence at the trial, as out of the issue, and as *coram non judice*; an authority which, in common sense, he certainly would have, if the jury had no higher jurisdiction in one case than in the other. The general plea thus sanctioned by immemorial custom so blends the law and the fact together, as to be inseparable but by the voluntary act of the jury in finding a special verdict: the general investigation of the whole charge is therefore before them; and although the defendant admits the fact laid in the information or indictment, he, nevertheless, under his general plea, gives evidence of others which are collateral, *referring them to the judgment of the jury, as a legal excuse or [*115] justification; and receives from their verdict a complete, general, and conclusive deliverance.

Mr. Justice BLACKSTONE, in the fourth volume of his Commentaries, p. 339, says, "The traitorous or felonious intent are the points and very gist of the indictment, and must be answered directly by the general negative, not guilty, and the jury will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were specially pleaded."

This, therefore, says Sir MATTHEW HALE, 1 H. Pl. Cr. 258, is upon all accounts the most advantageous plea for the defendant: "It would be a most unhappy case for the judge himself if the prisoner's fate depended upon

his directions; unhappy also for the prisoner: for if the judge's opinion must rule the verdict, the trial by jury would be useless."

The conclusive operation of the verdict when given, and the security of the jury from all consequences in giving it, renders the contrast between criminal and civil cases striking and complete. When the verdict is for the defendant, no new trial can be granted, as it may in a civil action: the Court, however they may disapprove of the acquittal, has no authority to award one; for there is no precedent of any such upon record, and the discretion of the Court is circumscribed by the law.

Neither can the jurors be attainted by the crown. In *Bushel's case*, that learned and excellent judge Lord VAUGHAN expressed himself thus, Vaugh. 146: "There is no case in all the law of an attain for the king, nor any opinion but that of Thyrning, 10 Hen. 4, title Attaint, 60, 64, for which there is no warrant at law, though there be other specious authority against it, touched by none that have argued this case."

(Lord MANSFIELD.—To be sure it is so.)—Since that is clear, it is unnecessary to trouble the Court farther upon it: indeed there is no authority to be found for such an attain, but a dictum in Fitzherbert's *Natura Brevium*, p. 107, and on the other hand the doctrine of *Bushel's case* is expressly agreed to in very modern times, Lord Raym. 403.

[*116] *If then the Court will reflect but for a moment upon this comparative view of criminal and civil cases, how can it be seriously contended, not merely that there is no difference, but that there is any the remotest similarity between them? In the one case, the power of accusation begins from the Court; in the other from the people only, forming a grand jury. In the one, the defendant must plead a special justification, the merits of which can only be decided by the judges; in the other, he may throw himself for general deliverance upon his country. In the first, the Court may award a new trial if the verdict for the defendant be contrary to the evidence or the law; in the last, it is conclusive and unalterable; and to crown the whole, the king never had that process of attain which belonged to the meanest of his subjects.

When these things are attentively considered, it might be asked of those who are still disposed to deny the right of the jury to investigate the whole charge, whether such a solecism can be conceived to exist in any human government, much less in the most refined and exalted in the world, as that a power of supreme judicature should be conferred at random by the blind forms of the law, where no right was intended to pass with it, and which was upon no occasion, and under no circumstance, to be exercised; which, though exerted notwithstanding in every age, and in a thousand instances, to the confusion and discomfiture of fixed magistracy, should never be checked by authority, but should continue on from century to century, the revered guardian of liberty and of life, arresting the arm of the most headstrong government in the worst of times, without any power in the crown or its judges to touch, without its consent, the meanest wretch in the kingdom, or even to ask the reason and principle of the verdict which acquits him. That such a system should prevail in a country like England, without either the original institution or the acquiescing sanction of the legislature, is impossible. No talents can reconcile, no authority can sanction, such an absurdity; the common sense of the world revolts at it.

Having established this important right in the jury, beyond all possibility of cavil or controversy, it remains to show that its existence is not merely consistent with theory, but is illustrated and confirmed by the universal practice of all judges; not even excepting Mr. Justice FORSTER himself,

*whose writings have been cited in support of the contrary opinion. How a man expresses his abstract ideas is but of little importance [117] when an appeal can be made to his plain directions to others, and to his own particular conduct; but even none of his expressions, when properly considered and understood, militate against the present position.

In a passage in his book on the criminal law, he expresses himself thus, *Post. Pl. Cr. 256*: "The construction which the law putteth upon fact STATED AND AGREED OR FOUND by a jury is in all cases undoubtedly the proper province of the Court."

Now, if we were to stop here, though the author never intended we should, as is evident from the rest of the sentence, and to take it as a substantive proposition, the slightest attention must discover that it is not repugnant to anything which has been just said. *Facts stated and agreed*, or *facts found* by a jury, which amounts to the same thing, constitute a special verdict; and who ever supposed that the law upon a special verdict was not the province of the Court? Who ever denied that where upon a general issue the parties choose to agree upon facts, and to state them, or the jury choose voluntarily to find them without drawing the legal conclusion themselves, that in such instances the Court is to draw it? That Mr. Justice FORSTER meant nothing more than that the Court was to judge of the law when the jury thus voluntarily prays its assistance by special verdict, is evident from his words which follow; for he immediately goes on to say, in cases of doubt and REAL difficulty, it is therefore commonly recommended to the jury to state facts and circumstances in a special verdict: but neither here, nor in any other part of his works, is it said or insinuated that they are bound to do so, but at their own free discretion: indeed the very term *recommended* admits the contrary, and requires no commentary. The wisdom or expediency of such a recommendation, in those cases of doubt, can never be disputed; to contend for the existence of such an important right is very different from arguing in favor of rashness and precipitation in the exercise of it.

It is no denial of jurisdiction to tell the greatest magistrate upon earth to take good counsel in cases of real doubt and difficulty. Judges upon trials, whose authority to state the *law is indisputable, often refer it to be [118] more solemnly argued before the Court; and this Court itself often holds a meeting of the twelve judges before it decides on a point upon its own records, of which the others have confessedly no cognisance till it comes before them by the writ of error of one of the parties. These instances are monuments of wisdom, integrity, and discretion, but they do not bear in the remotest degree upon jurisdiction: the sphere of jurisdiction is measured by what may or may not be decided by any given tribunal with legal effect, not by the rectitude or error of the decision. If the jury, according to these authorities, may determine the whole matter by their verdict, and if the verdict when given is not only final and unalterable, but must be enforced by the authority of the judges, and executed, if resisted, by the whole power of the state, upon what principle of government or reason can it be argued not to be law? That the jury are in this exact predicament is confessed by Mr. Justice FORSTER; for he concluded with saying, that when the law is clear, the jury, under the direction of the Court, in point of law may, and, if they are well advised, will *always find a general verdict conformably to such directions*.

This is likewise consistent with the position now contended for: if the law be clear, we may presume that the judge states it clearly to the jury; and if he does, undoubtedly the jury, if they are well advised, will find according to such directions; for they have not a capricious discretion to make law at

their pleasure, but are bound in conscience, as well as judges are, to find it truly; and, generally speaking, the learning of the judge who presides at the trial affords them a safe support and direction.

The same practice of judges in stating the law to the jury, as applied to the particular case before them, appears likewise in the case of *Rex v. Oneby*, B. R., 2 Lord Raym. 1494: "On the trial the judge directs the jury thus: if you believe such and such witnesses, who have sworn to such and such facts, *the killing of the deceased appears to be with malice prepense*; but if you do not believe them, then you ought to find him guilty of manslaughter: and the jury may, if they think proper, give a general verdict of murder or manslaughter, *but if they decline giving a general verdict, and will find the facts* [*119] *specially, the Court is then to form their judgment from the facts found, whether the defendant be guilty or not guilty, i. e., whether the act was done with malice and deliberation or not.*"

Surely language can express nothing more plainly or unequivocally than that where the general issue is pleaded to an indictment, the law and the fact are both before the jury; and that the former can never be separated from the latter, for the judgment of the Court, unless by their own spontaneous act: for the words are, "If they decline giving a general verdict, and will find the facts specially, the Court is THEN to form their judgment from the facts found." So that after a general issue joined, the authority of the Court only commences when the jury chooses to decline the decision of the law by a general verdict; the right of declining which legal determination is a privilege conferred on them by the statute of Westm. 2, and by no means a restriction of their powers.

But another very important view of the subject remains behind; for supposing it had been impossible to establish that contrast between criminal and civil cases, which is now too clear not only to require, but even to justify, another observation, the argument would lose nothing by the failure; the similarity between criminal and civil cases derives all its application to the argument from the learned judge's supposition, that the jurisdiction of the jury over the law was never contended for in the latter, and consequently on a principle of equality could not be supported in the former; whereas it can incontestably be demonstrated in both. This application of the argument is plain from the words of the charge: "If the jury could find the law, it would undoubtedly hold in civil cases as well as criminal: but was it ever supposed that a jury was competent to say the operation of a fine, or a recovery, or a warranty, which are mere questions of law?"¹

The answer to this question is, that the competency of the jury in such cases is contended for to the full extent, both by Littleton and by Coke: they cannot indeed decide upon them *de plano*, which, as Vaughan truly says, is unintelligible, because an unmixed question of law can by no possibility [*120] come before them for decision; but whenever **(which very often happens)* the operation of a fine, a recovery, a warranty, or any other record or conveyance known to the law of England, comes forward, mixed with the fact on the general issue, the jury have then most unquestionably a right to determine it; and what is more, no other authority possibly can; because when the general issue is permitted by law, these questions cannot appear on the record for the judgment of the Court; and although it can grant a new trial, yet the same question must ultimately be determined by another jury. This is not only self-evident to every lawyer, but, as has just been hinted, is expressly laid down by Littleton, § 368. "Also in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict

¹ Folio account of the trial, p. 49.

generally, as it is put in their charge : as in the case aforesaid they may well say, that the lessor did not disseise the lessee, if they will." Lord COKE, in his commentary on this section, confirms Littleton, saying, that in doubtful cases they should find specially for fear of an attainr; and it is plain that the statute of Westm. 2 was made either to give or to confirm the right of the jury to find the matter specially, if they would, leaving their jurisdiction over the law, as it stood by the common law, C. 80. The words of the statute of Westm. 2 are, "*Ordinatum est quod justiciarii ad assizas capiendas assignati, non compellant juratores dicere precise si sit disseisina vel non ; dummodo dicere voluerint veritatem facti, et petere auxilium curie.*"

From these words it should appear, that the jurisdiction of the jury over the law, when it came before them on the general issue, was so vested in them by the constitution, that the exercise of it in all cases had been considered to be compulsory upon them, and that this act was a legislative relief from that compulsion in the case of an assize of disseisin : it is equally plain from the remaining words of the act, that their jurisdiction remained as before : "*Sed si sponte velint dicere, quod disseisina est, vel non, admittatur eorum vere dictum, sub suo periculo.*"

But the most material observation upon this statute, as applicable to the present subject, is that the terror of the attainr from which it was passed to relieve them having (as has been shown) no existence in cases of crime, the act only *extended to relieve the jury at their discretion from finding [*121] the law in civil actions; and consequently it is only from custom, and not from positive law, that they are not *even compellable* to give a general verdict, involving a judgment of law, on every criminal trial.

These principles and authorities certainly establish that it is the duty of the judge, on every trial where the general issue is pleaded, to give to the jury his opinion on the law as applied to the case before them; and that they must find a general verdict comprehending a judgment of law, unless they choose to refer it specially to the Court.

But we are here in a case where it is contended that the duty of the judge is the direct contrary of this; that he is to give no opinion at all to the jury upon the law as applied to the case before them; that they likewise are to refrain from all consideration of it, and yet that the very same general verdict, comprehending both fact and law, is to be given by them as if the whole legal matter had been summed up by the one and found by the other.

It is impossible to comprehend the principle on which such a practice proceeds. Nothing more was contended for at the trial than the very practice recommended by Mr. Justice FORSTER and Lord RAYMOND. The jury were addressed upon the law with all possible respect and deference for, and indeed with very marked personal attention to, the learned judge. So far from urging the jury dogmatically to think for themselves without his constitutional assistance, his opinion was called for on the question of libel; and they were told that, if he should tell them distinctly the paper indicted was libellous, though I should not admit that they were bound at all events to give effect to it if they felt it to be innocent, yet that they ought not to go against the charge without great consideration; but if he should shut himself up in silence, giving no opinion at all upon the criminality of the paper, from which alone any guilt could be fastened on the publisher, and should narrow their consideration to the publication, a protest was entered against their finding a verdict affixing the epithet of *guilty* to the mere fact of publishing a paper, the *guilt* of which they had not investigated.

If, after this address to the jury, the learned judge had told them that, in his opinion, the paper was a libel, but still leaving it to their judgments,

[*122] and, leaving likewise the *defendant's evidence to their consideration, had further told them, that he thought it did not exculpate the publication; and if, in consequence of such directions, the jury had found a verdict for the crown, the present motion for a new trial would never have been made; because such a verdict of guilty must have been looked upon as founded on the opinion of the jury on the whole matter as left to their consideration, and the defendant must have sought his remedy by arrest of judgment on the record.

But the learned judge took a direct contrary course. He gave no opinion at all on the guilt or innocence of the paper; he took no notice of the defendant's evidence of intention; told the jury, in the most explicit terms, that neither the one nor the other were within their jurisdiction; and, upon the mere fact of publication, directed a general verdict comprehending the epithet of *guilty*, after having expressly withdrawn from the jury every consideration of the merits of the paper published, or the intention of the publisher, from which it is admitted on all hands the guilt of publication could alone have any existence.

The present motion is therefore founded upon this obvious and simple principle, that the defendant has had in fact no trial, having been found guilty without any investigation of his guilt, and without any power left to the jury to take cognisance of his innocence. It is easy to show that the jury could not possibly conceive or believe, from the judge's charge, that they had any jurisdiction to acquit him, however they might have been impressed even with the merit of the publication, or convinced of his meritorious intention in publishing it; nay, what is worse, while the learned judge totally deprived them of their whole jurisdiction over the question of libel, and the defendant's seditious intention, he at the same time directed a general verdict of guilty, which comprehended a judgment upon both.

This construction of the learned judge's direction is founded wholly on the language in which it was communicated; and it will be no answer to such construction, that no such restraint was meant to be conveyed by it. If the learned judge's intentions were even the direct contrary of his expressions, yet if, in consequence of that which was expressed, though not intended, the jury were abridged of a jurisdiction which belonged to them by law, and in [*123] the *exercise of which the defendant had an interest, he is equally a sufferer, and the verdict given under such misconception of authority is equally void. The application ought therefore to stand or fall by the charge itself; upon which, disclaiming all disingenuous cavilling, the defendant is certainly bound to show that, from the general result of it, fairly and liberally interpreted, the jury could not conceive that they had any right to extend their consideration beyond the bare fact of publication, so as to acquit the defendant by a judgment founded on the legality of the dialogue, or the honesty of the intention in publishing it.

In order to understand the learned judge's direction, it must be recollected that it was addressed to them in answer to what had been contended for on the part of the defendant; which was nothing more than that these two considerations ought to rule the verdict; and it will be seen that the charge, on the contrary, not only excluded both of them by general inference, but by expressions, arguments, and illustrations, the most studiously selected to convey that exclusion, and to render it binding on the consciences of the jury.

After telling them, in the very beginning of his charge, that the single question for their decision was, whether the defendant had published the pamphlet, he declared to them, that it was not even *allowed* to him, as the judge trying the cause, to say whether it was or was not a libel; for that if

he should say it was no libel, and they, following his direction, should acquit the defendant, they would thereby deprive the prosecutor of his writ of error upon the record, which was one of his dearest birthrights. The law, he said, was equal between the prosecutor and the defendant; that a verdict of acquittal would close the matter for ever, depriving him of his appeal; and that whatever therefore was upon the record *was not for their decision*, but might be carried, at the pleasure of either party, to the House of Lords.

Surely, language could not convey a limitation upon the right of the jury over the question of libel, or the intention of the publisher, more positive or more universal. It was positive, inasmuch as it held out to them that such a jurisdiction could not be entertained without injustice; and it was universal, because the principle had no special application *to the particular circumstances of that trial, but subjected every defendant, upon [*124] every prosecution for a libel, to an inevitable conviction on the mere proof of publishing *anything*, though both judge and jury might be convinced that the thing published was innocent and even meritorious.

This commentary runs no hazard of contradiction from any man whose reason is not disordered. For, if the prosecutor in every case has a birth-right by law to have the question of libel left open upon the record, which it can only be by a verdict of conviction on the single fact of publishing; no legal right can at the same time exist in the jury to shut out that question by a verdict of acquittal founded upon the merits of the publication, or the innocent mind of the publisher.

Rights that are repugnant and contradictory cannot be co-existent. The jury can never have a constitutional right to do an act beneficial to the defendant, which, when done, deprives the prosecutor of a right which the same constitution has vested in him. No right can belong to one person, the exercise of which, in every instance, must necessarily work a wrong to another. If the prosecutor of a libel has, in every instance, the privilege to try the merits of his prosecution before the judges, the jury can have no right, in any instance, to preclude his appeal to them by a general verdict for the defendant.

The jury, therefore, from this part of the charge, must necessarily have felt themselves absolutely limited (it might be said even in their powers) to the fact of publication; because the highest restraint upon good men is to convince them that they cannot break loose from it without injustice; and the power of a good citizen is never more effectually destroyed than when he is made to believe that the exercise of it will be a breach of his duty to the public, and a violation of the laws of his country.

But, since equal justice between the prosecutor and the defendant is the pretence for this abridgment of jurisdiction, let us examine a little how it is affected by it.

Do the prosecutor and the defendant really stand upon an equal footing by this mode of proceeding? With what decency this can be alleged I leave those to answer who know that it is only by the indulgence of the counsel for the prosecution *that the defendant is not at this moment in [*125] prison,¹ while we are discussing this supposed equality.

Besides, the judgment of the Court, though not final in the constitution, and therefore not binding on the prosecutor, is absolutely conclusive on the defendant. If this Court pronounce the record to contain no libel, and arrest the judgment on the verdict, the prosecutor may carry it to the House of

¹ The Court ordered the dean to be committed on the motion for the new trial, and said, they had no discretion to suffer him to be at large, without consent, after his appearance in court on conviction. Upon which *Bearcroft* gave his consent that the dean should remain at large upon bail.

Lords; and, pending his writ of error, remains untouched by your decision. But if judgment be against the defendant, it is only at the discretion of the crown (as it is said), and not of right, that he can prosecute any writ of error at all; and even if he finds no obstruction in that quarter, it is but at the best an appeal for the benefit of public liberty, from which he himself can have no personal benefit; for the writ of error being no *superedeas*, the punishment is inflicted on him in the mean time.

In the case of *Rex v. Horne*, this Court imprisoned him for publishing a libel upon its own judgment, pending his appeal from its justice; and he had suffered the utmost rigor which the law imposed upon him as a criminal, at the time that the House of Lords, with the assistance of the twelve judges of England, were assembled to determine whether he had been guilty of any crime. That case is not mentioned as hard or rigorous on Horne, as an individual: it is the general course of practice; but surely that practice ought to put an end to this argument of equality between prosecutor and prisoner.

Would it not be adding insult to injury, to tell an innocent man who is in a dungeon pending his writ of error, and of whose innocence both judge and jury were convinced at the trial, that he is in equal scales with his prosecutor, who is at large, because he has an opportunity of deciding, after the expiration of his punishment, that the prosecution had been unfounded, and his sufferings unjust?

By parity of reasoning, a prisoner in a capital case is to be hanged in the mean time for the benefit of equal justice; leaving his executors to fight the battle out with his prosecutors upon the record, through every court in the kingdom: *by which at last his attainder must be reversed, and the blood of his posterity remain uncorrupted. What justice can be more impartial or equal?

So much for this right of the prosecutor of a libel to *compel* a jury, in every case, generally to convict a defendant, on the fact of publication, or to find a special verdict,—a right unheard of before since the birth of the constitution; not even founded upon any equality in fact, even if such a shocking parity could exist in law, and not even contended to exist in any other case, where private men become the prosecutors of crimes for the ends of public justice.

It can have, generally speaking, no existence in any prosecution for felony; because the general description of the crime in such indictments, for the most part, shuts out the legal question in the particular instance, from appearing on the record; and for the same reason it can have no place even in appeals of death, &c., the only cases where prosecutors appear as the avengers of their own private wrongs, and not as the representatives of the crown.

The learned judge proceeded, next, to establish the same universal limitation upon the power of the jury, from the history of different trials, and the practice of former judges who presided at them. And here it must be, as through the whole course of the proceeding it always has been acknowledged, that the learned judge's misdirection in his charge was not peculiar to himself; it was only the resistance of the defendant's evidence, and what passed after the jury returned into court with the verdict, that was ever considered as a departure from all precedents: the rest had undoubtedly the sanction of several modern cases; and I should be distinctly understood, that the motion for a new trial is partly founded in opposition to these decisions.

It is necessary to take notice of some of them, as they occur in the learned judge's charge; for although he is not responsible for the rectitude of those precedents which he only cited in support of it, yet the defendant is unquestionably entitled to a new trial, if their principles are not ratified by the Court: for whenever the learned judge cited precedents to warrant the limi-

tation on the province of the jury imposed by his own authority, it was such an adoption of the doctrines they contained, as made them a rule to the jury in their decision.

First, then, the learned judge, to overturn the argument *with [*127] the jury for their jurisdiction over the whole charge, opposed your lordship's established practice for eight-and-twenty years; and the weight of this great authority was increased by the general manner in which it was stated; for there are no expressions of your lordship's in any of the reported cases which go the length contended for. The practice, indeed, is fully warranted by them; but we do not meet with the principle which can alone vindicate that practice fairly and distinctly avowed. The learned judge, therefore, referred to the charge of RAYMOND, Chief Justice, in the case of *Rex v. Franklin*, in which the universal limitation contended for is indeed laid down, not only in the most unequivocal expressions, but the ancient jurisdiction of juries, resting upon all the authorities now cited, treated as a ridiculous notion, which had just been taken up a little before the year 1731, and which no man living had ever dreamed of before. The learned judge observed that Lord RAYMOND stated to the jury on Franklin's trial that there were three questions: the first was, the fact of publishing the *Craftsman*: secondly, whether the averments in the information were true: but that the third, viz., whether it was a libel, was merely a question of law, with which the jury had nothing to do, as had been then of late thought by some people, who ought to have known better.

This direction of Lord RAYMOND's was fully ratified, and adopted in all its extent, and given to the jury, on the present trial, with several others of the same import, as an unerring guide for their conduct; and surely human ingenuity could not frame a more abstract and universal limitation upon their right to acquit the defendant by a general verdict; for Lord RAYMOND's expressions amount to an absolute denial of the right of the jury to find the defendant not guilty, if the publication and innuendoes are proved. "Libel or no libel is a question of law with which you, the jury, have nothing to do." How then can they have any right to give a general verdict, consistently with this declaration? Can any man in his senses collect that he has a right to decide on that with which he has nothing to do?

But it is needless to comment on these expressions, for the jury were likewise told by the learned judge himself, that, if they believed the fact of publication, they were bound to find the defendant guilty; and it will hardly be contended, *that a man has a right to refrain from doing that [*128] which he is bound to do.

The counsel on the other side explained this expression to have meant only that there was a religious and moral obligation upon them to refrain from the exercise of it.

Now, if the principle which imposed that obligation had been alleged to be special, applying only to the particular case of the *Dean of St. Asaph*, and consequently consistent with the rights of the jury to a more enlarged jurisdiction in other instances; telling the jury that they were bound to convict on proof of publication might be plausibly construed into a recommendation to refrain from the exercise of their right in that case, and not to a general denial of its existence: but the moment it is recollected, that the principle which bound them was not particular to the instance, but abstract and universal, binding alike in every prosecution for a libel, it requires no logic to pronounce the expression to be an absolute, unequivocal, and universal denial of the right.

But the jury were not only limited by these modern precedents, which certainly have an existence, but with still greater effect by the learned judge's

declaration, that some of those ancient authorities on which had been principally rested the establishment of their jurisdiction, had not merely been overruled, but were inapplicable. That, for instance, even in Bushel's case, which had been greatly depended on, the Court had said unanimously that if the jury be asked what the law is, they cannot say, and had likewise ratified in express terms the maxim, *Ad questionem legis non respondent juratores*.

Now, upon looking into that case, it will be found that the words of Lord VAUGHAN, which the learned judge considered as a judgment of the Court, denying the jurisdiction of the jury over the law, where a general issue is joined before them, were on the contrary made use of to expose the fallacy of such a misapplication of the maxim alluded to by the counsel against Bushel; declaring that it had no reference to any case where the law and the fact were incorporated by the plea of not guilty, and confirming the right of the jury to find the law upon every such issue, in terms the most emphatical and expressive. Vaugh. 150. This is manifest from the whole report.

[*129] *Bushel, one of the jurors on the trial of Penn and Mead, had been committed by the Court for finding the defendant not guilty, against the direction of the Court in matter of law; and being brought before the Court of Common Pleas by *habeas corpus*, this cause of commitment appeared upon the face of the return to the writ. It was contended by the counsel against Bushel, upon the authority of this maxim, that the commitment was legal, since it appeared by the return, that Bushel had taken upon him to find the law, against the direction of the judge, and had been therefore legally imprisoned for that contempt. It was upon that occasion that Chief Justice VAUGHAN, with the concurrence of the whole Court, repeated the maxim *Ad questionem legis non respondent juratores*, as cited by the counsel for the crown, but denied the application of it to impose any restraint upon jurors trying any crime upon the general issue. His language is too remarkable to be forgotten, and too plain to be misunderstood. Taking the words of the return to the *habeas corpus*, viz. "That the jury did acquit against the direction of the Court in matter of law." "These words," said this great lawyer, "taken literally and *de plano*, are insignificant and unintelligible, for no issue can be joined of matter of law; no jury can be charged with the trial of matter of law barely: no evidence ever was or can be given to a jury of what is law or not; nor any oath given to a jury to try matter of law alone, nor can any attain lie for such a false oath. Therefore we must take off this veil and color of words, which make a show of being something, but are in fact nothing: for if the meaning of these words, Finding against the direction of the Court in matter of law, be, that if the judge, having heard the evidence given in court (for he knows no other), shall tell the jury, upon this evidence, that the law is for the plaintiff or the defendant, and they, under the pain of fine and imprisonment, are to find accordingly; every one sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong; which were a strange and new-found conclusion, after a trial so celebrated for many hundreds of years in this country."

Lord Chief Justice VAUGHAN's argument is therefore plainly this. Adverting to the arguments of the counsel, he says, you talk of the maxim, *Ad questionem legis non respondent juratores*; but it has no sort of application [*130] to *your subject. The words of your return, viz. That Bushel did acquit against the direction of the Court in matter of law, are unintelligible, and, as applied to the case, impossible. The jury could not be asked in the abstract, what was the law: they could not have an issue of the

law joined before them; they could not be sworn to try it. *Ad questionem legis non respondent juratores*: therefore, to say literally, and *de plano*, that the jury found the law against the judge's direction, is absurd: they could not be in a situation to find it; an unmixed question of law could not be before them; the judge could not give any positive directions of law upon the trial, for the law can only arise out of facts, and the judge cannot know what the facts are till the jury have given their verdict. Therefore, continued the Chief Justice, let us take off this veil and color of words, which make a show of being something, but are in fact nothing: let us get rid of the fallacy of applying a maxim, which truly describes the jurisdiction of the courts over issues of law, to destroy the jurisdiction of jurors, in cases where law and fact are blended together upon a trial. For if the jury at the trial are bound to receive the law from the judge, every one sees that it is a mere mockery, and of no use in determining right and wrong.

This is the plain common sense of the argument, and it is impossible to suggest a distinction between its application to Bushel's case and to the present, except that the right of imprisoning the jurors was there contended for, in order to enforce obedience to the directions of the judge. But this distinction, if it deserves the name, though held up as very important, is a distinction without a difference. For if, according to VAUGHAN, the free agency of the jury over the whole charge, uncontrolled by the judge's direction, constitutes the whole of that ancient mode of trial; it signifies nothing by what means that free agency is destroyed; whether by the imprisonment of conscience or of body; by the operation of their virtues or of their fears: whether they decline exerting their jurisdiction from being told that the exertion of it is a contempt of religious and moral order, or a contempt of the Court, punishable by imprisonment; their jurisdiction is equally taken away.

If, in consequence of the learned judge's directions, the jury, from a just deference to learning and authority, from a nice and modest sense of duty, felt themselves not at liberty *to deliver the defendant from the whole indictment; he has not been tried. Because, though he was [131] entitled by law to plead generally that he was not guilty,—though he did in fact plead it accordingly, and went down to trial upon it,—yet the jury have not been permitted to try that issue, but have been directed to find at all events a general verdict of guilty; with a positive injunction not to investigate the guilt, or even to listen to any evidence of innocence.

In the case of Colonel Gordon, who was indicted for the murder of General Thomas, whom he had killed in a duel, and was tried a few sessions ago at the Old Bailey, by EYRE, Baron, the question was, whether, if the jury were satisfied of that fact, the prisoner was to be convicted of murder?

That was, according to *Forster*, as much a question of law, as libel or no libel; but the learned judge did not therefore feel himself at liberty to withdraw it from the jury. After stating the hard condition of the prisoner, who was brought to trial for his life, in a case where the positive law, and the prevailing manners of the times were strongly in opposition to one another, that he was afraid the punishment of individuals would never be able to beat down an offence so sanctioned, he addressed the jury nearly in these words: "Nevertheless, gentlemen, I am bound to declare to you what the law is as applied to this case, in all the different views in which it can be considered by you upon the evidence. Of this law and of the facts, as you shall find them, your verdict must be compounded, and I persuade myself, that it will be such a one as to give satisfaction to your own consciences."

Now if, instead of telling the jury that a duel, however fairly and honorably fought, was a murder by the law of England, and leaving them to find

a general verdict under that direction, he had said that whether such a duel was murder or manslaughter, was a question with which neither he nor they had anything to do, and on which he should therefore deliver no opinion; and had directed them to find that the prisoner was guilty of killing the deceased in a deliberate duel, telling them that the Court would settle the rest; that would have been directly consonant to the case of the present defendant. By this direction the prisoner would have been in the hands of the Court; and the judges, not the jury, would have decided upon the life of Colonel Gordon.

[*132] *But the directions of the two learned judges differ most essentially indeed.

Mr. Baron EYRE conceives himself bound in duty to state the law as applied to the particular facts, and to leave it to the jury.

Mr. Justice BULLER says, he is not bound, nor even allowed, so to state or apply it, and withdraws it entirely from their consideration.

Mr. Baron EYRE told the jury that their verdict is to be compounded of the fact and the law.

Mr. Justice BULLER, on the contrary, that it is to be confined to the fact only, the law being the exclusive province of the Court.

It is not for counsel to settle differences of opinion between the judges of England, nor to pronounce which of them is wrong: but since they are contradictory and inconsistent, counsel may hazard the assertion that they cannot both be right: the authorities which have been now cited, and the general sense of mankind, which settles everything else, must determine the rest.

We come now to a very important part of the case, a point untouched before in any of the arguments on this occasion.

That point is, that the learned judge's charge to the jury cannot be supported even upon its own principles; for, supposing the Court to be of opinion, that all which has been just said in opposition to these principles is inconclusive, and that the question of libel, and the intention of the publisher, were properly withdrawn from the consideration of the jury, still it can be made to appear that such a judgment would only render the misdirection more palpable and striking.

It may safely be assumed that the learned judge must have meant to direct the jury either to find a general or a special verdict; or, to speak more generally, that one of those two verdicts must be the object of every charge: for neither the records of the courts, the reports of their proceedings, nor the writings of lawyers, furnish any account of a third. There can be no middle verdict between both; the jury must either try the whole issue generally, or find the facts specially, referring the legal conclusion to the Court.

It may be affirmed with equal certainty, that the general verdict, *ex vi termini*, is universally as comprehensive as the issue; and that consequently [*133] such a verdict on an indictment, *upon the general issue, not guilty, universally and unavoidably involves a judgment of law, as well as fact; because the charge comprehends both, and the verdict, as has been said, is co-extensive with it. Both Lords Coke and Littleton give this precise definition of a general verdict; for they both say, that if the jury will find the law, they may do it by a general verdict, which is ever as large as the issue. If this be so, it follows by necessary consequence, that if the judge means to direct the jury to find generally against a defendant, he must leave to their consideration everything which goes to the constitution of such a general verdict, and is therefore bound to permit them to come to, and to direct them how to form, that general conclusion from the law and the fact which is involved in the term guilty. For it is ridiculous to say,

that guilty is a fact: it is a conclusion in law from a fact, and therefore can have no place in a special verdict, where the legal conclusion is left to the Court.

In this case the defendant is charged, not with having published this pamphlet, but with having published a certain false, scandalous, and seditious libel, with a seditious and rebellious intention. He pleads that he is not guilty in manner and form as he is accused; which plea is admitted on all hands to be a denial of the whole charge, and consequently does not merely put in issue the fact of publishing the pamphlet, but the truth of the whole indictment, i. e. the publication of the libel set forth in it, with the intention charged by it.

When this issue comes down for trial, the jury must either find the whole charge or a part of it; and admitting, for argument's sake, that the judge has a right to dictate either of these two courses, he is undoubtedly bound in law to make his direction to the jury conformable to the one or the other. If he means to confine the jury to the fact of publishing, considering the guilt of the defendant to be a legal conclusion for the Court to draw from that fact, specially found on the record, he ought to direct the jury to find that fact, without affixing the epithet of guilty to the finding. But, if he will have a general verdict of guilty, which involves a judgment of law as well as fact, he must leave the law to the consideration of the jury. For when the word guilty is pronounced by them, it is so well understood to comprehend everything charged by the indictment, *that the associate or [*134] his clerk instantly records, that the defendant is guilty in manner and form as he is accused, i. e. not simply that he has published the pamphlet contained in the indictment, but that he is guilty of publishing the libel with the wicked intentions charged on him by the record.

Now, if this general verdict of guilty is reflected on for a moment, the illegality of directing one upon the bare fact of publishing will appear in the most glaring colors. The learned judge says to the jury, "Whether this be a libel, is not for your consideration: I can give no opinion on that subject without injustice to the prosecutor; and as to what Jones swore concerning the defendant's motives for the publication, that is likewise not before you: for if you are satisfied in point of fact that the defendant published this pamphlet, you are bound to find him guilty." Why guilty? when the consideration of guilt is withdrawn. He confines the jury to the finding of a fact, and enjoins them to leave the legal conclusion from it to the Court; yet, instead of directing them to make that fact the subject of a special verdict, he desires them in the same breath to find a general one: to draw the conclusion without any attention to the premises; to pronounce a verdict which, upon the face of the record, includes a judgment upon their oaths that the paper is a libel, and that the publisher's intentions in publishing it were wicked and seditious, although neither the one nor the other made any part of their consideration.

Such a verdict is a monster in law, without precedent in former times, or root in the constitution. If it be true, on the principle of the charge itself, that the fact of publication was all that the jury were to find, and all that was necessary to establish the defendant's guilt,—if the thing published be a libel; why was not that fact found like all other facts upon special verdicts? why was an epithet, which is a legal conclusion from the fact, extorted from a jury who were restrained from forming it themselves? The verdict must be taken to be general or special: if general, it has found the whole issue without a co-extensive examination; if special, the word guilty, which is a conclusion from facts, can have no place in it.

Either this word guilty is operative or unessential; an epithet of substance,

[*135] or of form. It is impossible to controvert *that* proposition, and I give the gentlemen their choice of the alternative. If they admit it to be operative and of real substance, or, to speak more plainly, that the fact of publication, found specially, without the epithet of guilty, would have been an imperfect verdict, inconclusive of the defendant's guilt, and on which no judgment could have followed; then it is impossible to deny that the defendant has suffered injustice, because such an admission confesses that a criminal conclusion from a fact has been obtained from the jury, without permitting them to exercise that judgment which might have led them to a conclusion of innocence; and that the word guilty has been obtained from them at the trial as a mere matter of form; although the verdict without it, stating only the fact of publication, which they were directed to find, to which they thought the finding alone enlarged, and beyond which they never enlarged their inquiry, would have been an absolute verdict of acquittal.

If, on the other hand, to avoid this insuperable objection to the charge, the word guilty is to be reduced to a mere word of form, and it is to be contended that the fact of publication, found specially, would have been tantamount; be it so: let the verdict be so recorded; let the word guilty be expunged from it, and the defendant will trouble the Court no further on this motion. He will maintain, in arrest of judgment, that he is not convicted. But if this is not conceded, and the word guilty, though argued to be but form, and though as such obtained from the jury, is still preserved upon the record, and made use of against the defendant as substance; it will then become us (independent of all consideration as lawyers) to consider a little how that argument is to be made consistent with the honor of gentlemen, or that fairness of dealing which cannot but have place wherever justice is administered.

But in order to establish that the word guilty is a word of essential substance; that the verdict would have been imperfect without it; and that therefore the defendant suffers by its insertion; it will be easy to show your lordship, upon every principle and authority of law, that if the fact of publication, which was all that was left to the jury, had been found by special verdict, no judgment could have been given on it.

Let us try this by taking the fullest finding which the facts in evidence [*136] could possibly have warranted. Supposing then, *for instance*, the jury had found that the defendant published the paper according to the tenor of the indictment; that it was written of and concerning the king and his government; and that the innuendoes were likewise as averred, *K.* meaning the present king, and *P.* the present parliament of Great Britain: on such a finding no judgment could have been given by the Court, even if the record had contained a complete charge of a libel. No principle is more unquestionable than that, to warrant any judgment upon a special verdict, the Court, which can presume nothing that is not visible on the record, must see sufficient matter upon the face of it, which, if taken to be true, is conclusive of the defendant's guilt. They must be able to say, if this record be true, the defendant cannot be innocent of the crime which it charges on him. But from the facts of such a verdict the Court could arrive at no such legitimate conclusion; for it is admitted on all hands, and indeed expressly laid down by your lordship in the case of *Rex v. Woodfall*, that publication, even of a libel, is not *conclusive* evidence of guilt: for that the defendant may give evidence of an innocent publication.

Looking, therefore, upon a record containing a good indictment of a libel, and a verdict finding that the defendant published it, but without the epithet of guilty, the Court could not pronounce that he published it with the malicious intention which is the essence of the crime; they could not say what

might have, passed at the trial; for anything that appeared to them, he might have given such evidence of innocent motive, necessity, or mistake, as might have amounted to excuse or justification. They would say that the facts stated upon the verdict would have been fully sufficient, *in the absence of a legal defence*, to have warranted the judge to have directed, and the jury to have given, a general verdict of guilty, comprehending the intention which constitutes the crime; but that to warrant the bench, which is ignorant of everything at the trial, to presume that intention, and thereupon to pronounce judgment on the record, the jury must not merely find full evidence of the crime, but such facts as compose its legal definition. This wise principle is supported by authorities which are perfectly familiar.

If, in an action of trover, the plaintiff proves property in himself, possession in the defendant, and a demand and refusal of the thing charged to be converted; this evidence, *unanswered, is full proof of a conversion: and if the defendant could not show to the jury why he [*137] had refused to deliver the plaintiff's property on a legal demand of it, the judge would direct them to find him guilty of the conversion. But on the same facts found by special verdict, no judgment could be given by the Court: the judges would say, If the special verdict contains the whole of the evidence given at the trial, the jury should have found the defendant guilty, for the conversion was fully proved; but we cannot declare these facts to amount to a conversion, for the defendant's intention was a fact which the jury should have found from the evidence, over which we have no jurisdiction.

So, in the case put by Lord COKE, Co. Litt. 115. If a *modus* is found to have existed beyond memory till within thirty years before the trial, the Court cannot, upon such facts found by special verdict, pronounce against the *modus*; but any one of your lordships would certainly tell the jury, that upon such evidence they were warranted in finding against it.

In all cases of prescription the universal practice of judges is to direct juries, by analogy to the statute of limitations, to decide against incorporeal rights, which for many years have been relinquished; but such modern relinquishments, if stated upon the record by special verdict, would in no instance warrant a judgment against any prescription. The principle of the difference is obvious and universal; the Court looking at a record can presume nothing; it has nothing to do with reasonable probabilities, but is to establish legal certainties by its judgments. Every crime is, like every other complex idea, capable of a legal definition; if all the component parts which go to its formation are put as facts upon the record, the Court can pronounce the perpetrator of them a criminal: but if any of them are wanting, it is a chasm in fact, and cannot be supplied. Wherever intention goes to the essence of the charge, it must be found by the jury; it must be either comprehended under the word guilty in the general verdict, or specially found as a fact by the special verdict. This was solemnly decided by the Court in Huggins' case (T. 3 Geo. 2, 2 Ld. Raym 1574), in second Lord Raymond, which was a special verdict of murder from the Old Bailey.

It was an indictment against John Huggins and James *Barnes for [*138] the murder of Edward Arne. The indictment charged that Barnes made an assault upon Edward Arne, being in the custody of the other prisoner Huggins, and detained him for six weeks in a room newly built over the common sewer of the prison, where he languished and died: the indictment further charged, that Barnes and Huggins well knew that the room was unwholesome and dangerous: the indictment then charged that the prisoner Huggins of his malice aforethought was present, aiding and abetting Barnes to commit the murder aforesaid. This was the substance of the indictment.

The special verdict found that Huggins was warden of the Fleet by letters patent: that the other prisoner Barnes was servant to Gibbons, Huggins' deputy in the care of all the prisoners and of the deceased, a prisoner there. That the prisoner Barnes, on the 7th of September, put the deceased Arne in a room over the common sewer which had been newly built, knowing it to be newly built and damp, and situated as laid in the indictment; and that fifteen days before the prisoner's death, Huggins likewise well knew that the room was new built, damp, and situated as laid. They found that fifteen days before the death of the prisoner, Huggins was present in the room, and saw him there but under duress of imprisonment, but then and there turned away, and Barnes locked the door, and that from that time till his death the deceased remained locked up.

It was argued before the twelve judges in Serjeant's Inn whether Huggins was guilty of murder. It was agreed that he was not answerable *criminally* for the act of his deputy, and could not be guilty, unless the criminal intention was brought personally home to himself. And it is remarkable how strongly the judges required the fact of knowledge and malice to be stated on the face of the verdict, as opposed to *evidence* of intention, and inference from a fact.

The Court said, it is chiefly relied on that Huggins was present in the room, and saw Arne *sub duritie imprisonamenti, et si avertit*; but he might be present and not know all the circumstances: the words are *VIDIT sub duritie*; but he might *see* him under duress, and not *know* he was under duress. It was answered, that seeing him under duress evidently means he knew he was under duress; but, says the Court, "We cannot take things by inference in this manner; his seeing is but evidence of his knowledge of [*139] these *things, and therefore the jury, if the fact would have borne it, should have found that Huggins knew he was there without his consent; which not being done, we cannot intend these things, nor infer them; we must judge upon the facts found, and not on the evidence of the facts;" and cited Kelinge (Kel. 78), to show that whether a man be aiding and abetting a murder is matter of fact, and ought to be expressly found by a jury.

The application of these last principles and authorities to the case before the Court is obvious and simple.

The criminal intention is a fact, and must be found by the jury; and that finding can only be expressed upon the record by the general verdict of guilty which comprehends it, or by the special enumeration of such facts as do not merely amount to evidence of, but which completely and conclusively constitute, the crime. But it has been shown, and indeed is admitted, that the publication of a libel is only *prima facie* evidence of the complex charge in the indictment, and not such a fact as amounts in itself, when specially stated, to conclusive guilt; since, as the judges cannot tell how the criminal inference from the fact of publishing a libel might have been rebutted at the trial, no judgment can follow from a special finding that the defendant published the paper indicted according to the tenor laid in the indictment.

It follows from this, that if the jury had only found the fact of publication, which was all that was left to them, *without affixing the epithet of guilty*, which could be only legally affixed by an investigation not permitted to them; a *venire facias de novo* must have been awarded, because of the uncertainty of the verdict as to the criminal intention; whereas it will now be argued that, if the Court shall hold the dialogue to be a libel, the defendant is fully convicted; because the verdict does not merely find that he published, which is a finding consistent with innocence, but finds him GUILTY of publishing, which is a finding of the criminal publication charged by the indictment.

How to make a defence against such an argument it is not necessary now to say. The weight of it is very considerable; but that surely entitles him to greater attention, when he complains of that which subjects him to it, without the warrant of the law. It is that which entitles him to a new *trial; for he is not only found guilty without any investigation of [*140] his guilt by the jury, but without that question being even open to the Court on the record. Upon the record the Court can only say the dialogue is or is not a libel; but if it should pronounce it to be one, the criminal intention of the defendant in publishing it is taken for granted by the word guilty; although it has not only not been tried, but evidently appears from the verdict itself not to have been found by the jury. Their verdict is, "guilty of publishing, but whether a libel or not, they do not find." And it is, therefore, impossible to say that they can have found a criminal motive in publishing a paper on the criminality of which they have formed no judgment. Printing and publishing that which is legal contains in it no crime; the guilt must arise from the publication of a libel; and there is therefore a palpable repugnancy on the verdict itself, which first finds the dean guilty of publishing, and then renders the finding a nullity, by pronouncing ignorance in the jury whether the thing published comprehends any guilt.

To conclude this part of the subject, the epithet of guilty (as was said at first) must either be taken to be substance or form. If it be substance, and, as such, conclusive of the *criminal* intention of the publisher, should the thing published be hereafter adjudged to be a libel, the defendant asks for a new trial, because his guilt in that respect has been found without having been tried. If, on the other hand, the word GUILTY is admitted to be but a word of form, then let it be expunged, and he is not hurt by the verdict.

Having now established, according to the first two propositions, that the jury, upon every general issue, joined in a criminal case, have a constitutional jurisdiction over the whole charge, it follows next, in support of the third, to contend, that the case of a libel forms no legal exception to the general principles which govern the trial of all other crimes; that the argument for the difference, viz., because the whole charge always appears on the record, is false in fact, and that, even if true, it would form no substantial difference in law.

As to the first, it must again be repeated that the whole case does by no means necessarily appear on the record; the crown may indict part of the publication, which may bear a criminal construction when separated from the context, and the context omitted. Having no place in the indictment, *the defendant can neither demur to it, nor arrest the judgment after [*141] a verdict of guilty; because the Court is absolutely circumscribed by what appears on the record, and the record contains a legal charge of a libel. It follows besides, from the principles adopted upon this trial, that he is equally shut out from such defence before the jury; for though he may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publishing the matter which is contained in the indictment, however its innocence may be established by a view of the whole work. The only operation which looking at the context can have upon a jury is, to convince them that the matter upon the record, however libellous when taken by itself, was not intended to convey the meaning which the words indicted import in language, when separated from the general scope of the writing; but, upon the principle contended for, they could not acquit the defendant upon any such opinion, for that would be to take upon them the prohibited question of libel, which is said to be matter of law for the Court.

I put the case from Algernon Sidney, to show the absurd conclusion as to

which the doctrine contended for by the other side must bring them ; for it is impossible to deny that if the jury can look at the context in the case put by Sidney, and acquit the defendant on the merits of the thing published, they may do it in cases which will directly operate against the principle which counsel on the other side seem to support. This will appear from other instances, where the injustice is equal, but not equally striking.

Suppose the crown were to select some passage from Locke upon Government, as for instance, "that there was no difference *between the king and the constable, when either of them exceeded their authority.*" That assertion, under certain circumstances, if taken by itself without the context, might be highly seditious, and the question therefore would be *quo animo* it was written : perhaps the real meaning of the sentence might not be discoverable by the immediate context, without a view of the whole chapter, perhaps of the whole book ; therefore to do justice to the defendant, upon the very principle by which Sidney's case has been answered, the jury must look into the whole Essay on Government, and form a judgment of the design of the author, and the meaning of his work. [Lord MANSFIELD.—"To be sure [*142] they may *judge from the whole work."'] And what is this but determining the question of libel ? which is denied to-day : for if a jury may acquit the publisher of any part of Mr. Locke on Government, from a judgment arising out of a view of the whole book, though there be no innuendoes to be filled up as facts in the indictment ; what is it that bound the jury to convict the Dean of St. Asaph, as the publisher of Sir William Jones's dialogue, on the bare fact of publication, without the right of saying that his observations, as well as Mr. Locke's, were speculative, abstract, and legal ? [Lord MANSFIELD.—"They certainly may in all cases go into the whole context."'] And *why* may they go into the context ? clearly, to enable them to form a correct judgment of the meaning of the part indicted, even though no particular meaning be submitted to them by averments in the indictment ; and therefore the very permission to look at the context for such a purpose (where there are no innuendoes to be filled up by them as facts) is a palpable admission of all contended for on the part of the defendant, viz., the right of the jury to judge of the merits of the paper, and the intention of its author.

But it is said that though a jury have a right to decide that a paper, criminal as far as it appears on the record, is nevertheless legal, when explained by the whole work of which it is a part ; yet that they shall have no right to say that the whole work itself, if it happens to be all indicted, is innocent and legal. This proposition, upon the bare stating of it, seems too preposterous to be seriously entertained ; yet there is no alternative between maintaining it in its full extent, and abandoning the whole argument.

If the defendant is indicted for publishing part of the verse in the Psalms, "There is no God," it is asserted that the jury may look at the context, and seeing that the whole verse did not maintain that blasphemous proposition, but only that the fool had said so in his heart, may acquit the defendant upon a judgment that it is no libel to impute such imagination to a fool : but if the whole verse had been indicted, viz., "The fool has said in his heart there is no God ;" the jury on the principle contended for, would be restrained from the same judgment of its legality, but must convict of blasphemy on the fact of publishing, leaving the question of libel untouched on the record.

[*143] If, in the same manner, only part of this very dialogue *had been indicted instead of the whole, it is said, even by your lordship, that the jury might have read the context, and then, notwithstanding the fact of publishing, might have collected from the whole its abstract and speculative

nature, and have acquitted the defendant upon that judgment of it; and yet it is contended that they have no right to form the same judgment of it upon the present occasion, although the whole be before them upon the face of the indictment, but are bound to convict the defendant upon the fact of publishing, notwithstanding they should have come to the same judgment of its legality which it is admitted they might have come to on trying an indictment for the publication of a part. Really, the absurdities and manifest departures from reason, which must be hazarded to support this doctrine, are endless.

The criminality of the paper is said to be a question of law, yet the meaning of it, from which alone the legal interpretation can arise, is admitted to be a question of fact. If the text be so perplexed and dubious as to require innuendoes to explain, to point, and to apply obscure expressions or construction, the jury alone, as judges of fact, are to interpret, and to say what sentiments the author must have meant to convey by his writing; yet if the writing be so plain and intelligible as to require no averments of its meaning, it then becomes so obscure and mysterious as to be a question of law, and beyond the reach of the very same men, who but a moment before were interpreters for the judges; and though its object be most obviously peaceable, and its author innocent, they are bound to say upon their oaths, that it is wicked and seditious, and the publisher of it guilty.

As a question of fact, the jury are to try the real sense and construction of the words indicted, by comparing them with the context; and yet if that context itself which affords the comparison makes part of the indictment, the whole becomes a question of law; and they are then bound down to convict the defendant on the fact of publishing it, without any jurisdiction over the meaning. To complete the inconsistency, the intention of the publisher may likewise be shown as a fact, by the evidence of any extrinsic circumstances, such as the context to explain the writing, or the circumstances of mistake or ignorance under which it was published; and yet in the same breath the intention is pronounced to be an inference of law from the act of publication, which the jury *cannot exclude, but which must depend upon the [*144] future judgment of the Court.

But the danger of this system is no less obvious than its inconsistency. Its authors undoubtedly never thought of inflicting death upon Englishmen without the interposition of a jury; yet its establishment would extend to annihilate the substance of that trial in every prosecution for high treason, where the publication of any writing was laid as the overt act.

If an indictment charges that a defendant did traitorously intend, compass, and imagine the death of the king; and in order to carry such treason into execution, published a paper which it sets out, *literatim*, on the face of the record, the principle which is laid down to-day would subject that person to the pains of death by the single authority of the judges, without leaving anything to the jury, but the bare fact of publishing the paper. For, if that fact were proved, and the defendant called no witnesses, the judge who tried him would be warranted, nay, bound in duty, by the principle in question, to say to the jury, Gentlemen, the overt act of treason charged upon the defendant is the publication of this paper, intending to compass the death of the king; the fact is proved, and you are therefore bound to convict him: the treasonable intention is an inference of law from the act of publishing; and if the thing published does not upon a future examination intrinsically support that inference, the Court will arrest the judgment, and your verdict will not affect the prisoner.

The defendant may rest the whole argument upon the analogy between these two cases, and give up every objection to the doctrine when applied to

the one, if upon the strictest examination it shall not be found to apply equally to the other.

If the seditious intention be an inference of law, from the fact of publishing the paper which this indictment charges to be a libel, is not the treasonable intention equally an inference from the fact of publishing that paper, which the other indictment charges to be an overt act of treason? In the one case as in the other, the writing or publication of a paper is the whole charge; and the substance of the paper so written or published makes all the difference between the offences in the two supposed cases. If that substance be matter of law where it is a seditious libel, it must be matter of law [*145] where it is an act of treason: and if because *it is law, the jury are excluded from judging it in the one instance, their judgment must suffer an equal infringement in the other.

The consequence is obvious. If the jury by an appeal to their consciences are to be thus limited in the free exercise of that right which was given them by the constitution, to be a protection against judicial authority where the weight and majesty of the crown is put into the scale against an obscure individual, the freedom of the press is at an end; for how can it be said that the press is free because everything may be published without a previous license, if the publisher of the most meritorious work which the united powers of genius and patriotism ever gave to the world may be prosecuted by information of the king's Attorney-General, without the consent of the grand jury, may be convicted by the petty jury, on the mere fact of publishing (who indeed, without perjuring themselves, must on this system inevitably convict him), and must then depend upon judges who may be the supporters of the very administration whose measures are questioned by the defendant, and who must therefore either give judgment against him or against themselves?

To all this it is shortly answered, Are you not in the hands of the same judges, with respect to your property and even to your life, when special verdicts are found in murder, felony, and treason? In these cases do prisoners run any hazard from the application of the law by the judges to the facts found by the juries? Where can you possibly be safer?

This is an argument which can be answered without indelicacy or offence, because the Court is much too liberal to suppose, that they are insulted by general observations on the principles of our legal government. However safe we might be, or might think ourselves, the constitution never intended to invest judges with a discretion which cannot be tried and measured by the plain and palpable standard of law; and in all the cases put on the other side, no such loose discretion is exercised as must be entertained by a judgment on a seditious libel, and therefore the cases are not parallel.

On a special verdict for murder, the life of the prisoner does not depend upon the religious, moral, or philosophical ideas of the judges, concerning the nature of homicide: no precedents are searched for, and if he is condemned at all, he is judged exactly by the same rule as others have been [*146] judged by before him; his conduct is brought to a precise, *clear, intelligible standard, and cautiously measured by it: it is the law therefore, and not the judge, which condemns him. It is the same in all indictments or civil actions for slander upon individuals. Reputation is a personal right of the subject, indeed the most valuable of any; and it is therefore secured by law, and all injuries to it clearly ascertained: whatever slander hurts a man in his trade, subjects him to danger of life, liberty or loss of property, or tends to render him infamous, is the subject of an action, and in some instances of an indictment. But in all these cases where the *malus animus* is found by the jury, the judges are in like manner a safe repository of the legal consequence; because such libels may be brought to a

well-known standard of strict and positive law ; they leave no discretion in the judges : the determination of what words, when written or spoken of another are actionable, or the subject of an indictment, leaves no more latitude to a court sitting in judgment on the record, than a question of title does in a special verdict in ejectment.

But consider by what rule the legality or illegality of this dialogue is to be decided by the Court as a question of law upon the record. It was admitted by the counsel for the prosecution at the trial, in the most unequivocal terms (what indeed it was impossible to deny), that every part of it, when viewed in the abstract, was legal ; but then it was said there is a great distinction to be taken between speculation and exhortation, and that it is this latter which makes it a libel. The truth of the observation is certain, but how the cause is to determine that difference as a question of law is past comprehension ; for if the dialogue in its phrase and composition be general, and its libellous tendency arises from the purpose of the writer to raise discontent by a seditious application of legal doctrines ; that purpose is surely a question of fact, if ever there was one, and must therefore be distinctly averred in the indictment, to give the cognizance of it as a fact to the jury, without which no libel can possibly appear upon the record : this is well known to be the only office of the *innuendo* ; because the judges can presume nothing which the strictest rules of grammar do not warrant them to collect intrinsically from the writing itself.

Circumscribed by the record, the Court can form no judgment of the tendency of this dialogue to excite sedition by anything but the mere words : they must look at it as if it *was an old manuscript dug out of the ruins of Herculaneum ; they can collect nothing from the time when, [*147] or the circumstances under which, it was published ; the person by whom and those amongst whom it was circulated : yet these may render a paper at one time, and under some circumstances, dangerously wicked and seditious, which at another time, and under different circumstances, might be innocent and even highly meritorious.

If, puzzled by a task so inconsistent with the real sense and spirit of judicature, the Court should spurn the fetters of the record, and judging with the reason rather than with the infirmities of men, should take into consideration the state of men's minds on the subject of equal representation at this moment, and the great disposition of the present times to revolution in government ; if, reading the record with these impressions, they should be led to a judgment not warranted by an abstract consideration of the record : then, besides that such a judgment would be founded on facts not in evidence before the Court, and not within its jurisdiction, if they were ; it is further to be considered, that even if these objections to the premises were removed, the conclusion would be no conclusion of law : their decision on the subject might be very sagacious, as politicians, as moralists, as philosophers, or as licensers of the press, but they would have no resemblance to the judgments of an English court of justice, because it could have no warrant from the acts of their predecessors, nor can afford any precedent to their successors.

But all these objections are perfectly removed, when the seditious tendency of a paper is considered as a question of fact : we are then relieved from the absurdity of a legal discussion separated from all the facts from which alone the law can arise ; for the jury can do what (as was observed before) the Court cannot do, in judging by the record ; they can examine by evidence all those circumstances that lead to establish the seditious tendency of the paper, from which the Court is shut out ; they may know themselves, or it may be proved before them, that it has excited sedition already ; they may collect from witnesses that it has been widely circulated, and seditiously understood ;

or if the prosecution (as is wisest) precedes these consequences, and the reasoning must be *a priori*, surely gentlemen living in the country are much [*148] better judges than the Court, what has or has not a tendency *to disturb the neighborhood in which they live, and that very neighborhood is the *forum* of criminal trial.

If they know that the subject of the paper is the topic that agitates the country around them; if they see danger in that agitation, and have reason to think that the publisher must have intended it, they say he is guilty. If, on the other hand, they consider the paper to be legal and enlightening in principle; likely to promote a spirit of activity and liberty, in times when the activity of such a spirit is essential to the public safety, and have reason to believe it to be written and published in that spirit; they say, as they ought to do, that the writer or the publisher is not guilty. Whereas the judgment of the Court upon the language of the record must ever be in the pure abstract; operating blindly and indiscriminately upon all times, circumstances, and intentions; making no distinction between the glorious attempts of a Sidney or a Russel struggling against the terrors of despotism under the Stuarts, and those desperate adventurers of the year forty-five, who libelled the person, and excited rebellion against the mild and gracious government of King George the Second.

If the independent gentlemen of England are thus better qualified to decide, from cause of knowledge, it is no offence to the Court to say, that they are full as likely to decide with impartial justice as judges appointed by the crown. Their landed property depends upon the security of the government, and no man who wantonly attacks it can hope or expect to escape from the selfish lenity of a jury. On the first principles of human action they must lean heavily against him. It is only when the pride of Englishmen is piqued by such doctrines as we are opposing to-day, that they think it better to screen the guilty, by an indiscriminate opposition to them, than surrender those rights by which alone innocence in the day of danger can be protected.

I venture therefore to say, where a writing indicted as a libel neither contains, nor is averred by the indictment to contain, any slander of an individual, so as to fall within those rules of law which protect personal reputation, but whose criminality is charged to consist (as in the present instance) in its tendency to stir up general discontent, the trial of such an indictment neither involves nor can in its obvious nature involve any abstract question [*149] of law for the *judgment of a court, but must wholly depend upon the judgment of the jury on the tendency of the writing itself to produce such consequences, when connected with all the circumstances which attended its publication.

It is unnecessary to push this part of the argument further, because nothing has fallen from the bar against the position which it maintains: none of the gentlemen have given the Court any one single reason, good or bad, why the *tendency* of a paper to stir up discontent against government, separated from all the circumstances which are ever shut out from the record, ought to be considered as an abstract question of law: they have not told us where we are to find any matter in the books to enable us to argue such questions before the Court, or where the Court themselves are to find a rule for their judgment on such subjects. That surely looks more like legislation, or arbitrary power, than English judicature. If the Court can say this is a criminal writing, *not* because we know that mischief was intended by its author, or is even contained in itself, but because fools, believing the one and the other, may do mischief in their folly; the suppression of such writings under particular circumstances may be wise policy in a state, but upon what principle it can be criminal law in England to be settled in the abstract by judges, is a thing beyond all comprehension.

Feeling the difficulty of maintaining such a proposition by any argument of law, recourse was had by one of the counsel for the prosecution to an argument of fact. "If (said he) what is or is not a seditious libel, be not a question of law for the Court, but of fact for the jury, upon what principle do defendants found guilty of such libels by a general verdict defeat the judgment for error on the record? and what is still more in point, upon what principle does the defendant, if he fails in his present motion, mean to ask the Court to arrest this very judgment, by saying that the dialogue is not a libel?"

The observation is very ingenious, and God knows the argument requires that it should; but it is nothing more. The arrest of judgment which follows after a verdict of guilty for publishing a writing, which on inspection of the record exhibits to the Court no specific offence against the law, is no impeachment of our doctrine: we never denied such a jurisdiction to the Court. Our position is, that no *man shall be punished for the criminal breach of any law, until a jury of his equals have pronounced him guilty in [*150] mind as well as in act. *Actus non facit reum nisi mens sit rea*.

But we never asserted that a jury had the power to make criminal law, as well as to administer it; and therefore it is clear that they cannot deliver over a man to punishment, if it appears by the record of his accusation, which is the office of judicature to examine, that he has not offended against any positive law; because, however criminal he may have been in his disposition, which is a fact established by the verdict, yet statute and precedents can alone decide what is by law an *indictable* offence.

If, for instance, a man were charged by an indictment with having held a discourse in words highly defamatory, and were found guilty by the jury, it is evident that it is the province of the Court to arrest that judgment; because though the jury have found that he spoke the words as laid in the indictment, with the malicious intention charged upon him, which they and they only could find; yet as the words are not punishable by indictment, as, when committed to writing, the Court could not pronounce judgment, the declaration of the jury that the defendant was guilty in manner and form as accused could evidently never warrant a judgment, if the accusation itself contained no charge of an offence against the law.

In the same manner, if a butcher were indicted for privately putting a sheep to causeless and unnecessary torture in the exercise of his trade, but not in public view, so as to be productive of evil example, and the jury should find him guilty, no judgment could follow; because though done *malo animo*, yet neither statute nor precedent have, perhaps, determined it to be an indictable offence; it would be difficult to draw the line. An indictment would not lie for every inhuman neglect of the sufferings of the smallest innocent animals which Providence has subjected to us.

A thousand other instances might be brought of acts base and immoral, and prejudicial in their consequences, which are not yet indictable by law.

In the case of *Rex v. Bower*, B. R. T. 15 Geo. 3, Cowp. 323, it was held that *knowingly* exposing to sale and selling gold which was under the *standard, as and for standard gold, is not indictable; because the act refers to goldsmiths only; and private cheating is not a common-law offence. [*151]

Here too the declaration of the jury that the defendant is guilty in manner and form as accused does not change the nature of the accusation: the verdict does not go beyond the charge; and if the charge be invalid in law, the verdict must be invalid also.

All these cases therefore, and many similar ones which might be put, are clearly consistent with the principle we contend for. We do not seek to

erect jurors into legislators or judges: there must be a rule of action in every society, which it is the duty of the legislature to create, and of the judicature to expound when created. We only support their right to determine guilt or innocence, where the crime charged is blended by the general issue with the intention of the criminal; more especially when the quality of the act itself, even independent of that intention, is not measurable by any precise principle or precedent of law, but is inseparably connected with the time when, the place where, and the circumstances under which the defendant acted.

In considering libels of this nature, as opposed to slander on individuals, to be mere questions of fact, or at all events to contain matter fit for the determination of the jury, we are supported not only by the general practice of courts, but even of those very practisers themselves who, in prosecuting for the crown, have maintained the contrary doctrine.

It will surely be admitted that the general practice of the profession, more especially of the very heads of it, prosecuting too for the public, is strong evidence of the law. Attorney-Generals have seldom entertained such a jealousy of the king's judges, in state prosecutions, as to lead them to make presents of jurisdictions to juries, which did not belong to them of right by the constitution of the country. Neither can it be supposed that men in high office and of great experience should in every instance (though differing from each other in temper, character, and talents) uniformly fall into the same absurdity of declaiming to juries upon topics totally irrelevant, when no such inconsistency is found to disfigure the professional conduct of the same men in other cases. Yet to appeal to the recollection of the Court, without having recourse to the State Trials, upon every prosecution for a [*152] *seditious libel within living memory has not the Attorney-General uniformly stated such writings at length to the jury, pointed out their seditious tendency, which rendered them criminal, and exerted all his powers to convince them of their illegality, as the very point on which their verdict for the crown was to be founded?

On the trial of Mr. Horne, for publishing an advertisement in favor of the widows of those American subjects who had been *murdered* by the king's troops at Lexington, did the present Chancellor, then Attorney-General, content himself with saying that he had proved the publication, and that the criminal quality of the paper which raised the legal inference of guilt against the defendant was matter for the Court? No; he went at great length into its dangerous and pernicious tendency, and applied himself to the understandings and the consciences of the jurors. This instance is in itself decisive of *his* opinion. He could not have acted thus upon the principle contended for to-day.

The opinion of the late Lord Chief Justice DE GREY, in like manner, is to be inferred from his uniform conduct. In all such prosecutions, while he was in office, he held the same language to juries; and particularly in the case of *Rex v. Woodfall* (to use the expression of a celebrated writer on the occasion), he tortured his faculties for more than two hours, to convince them that Junius's letter was a libel.

Lord CAMDEN, prosecuting Dr. Shebbeare, told the jury, that he did not desire their verdict upon any other principle than their solemn conviction of the truth of the information; which charged the defendant with a wicked design to alienate the hearts of the subjects of this country from their king upon the throne.

To complete the account: Mr. *Bearcroft* upon this very occasion spoke above an hour to the jury at Shrewsbury, to convince them of the libellous tendency of the dialogue, which soon afterwards the learned judge desired

them wholly to dismiss from their consideration, as matter with which they had no concern.

Having supported the rights of juries by the uniform practice of crown lawyers, let us now examine the question of authority, and see how this Court itself and its judges have acted upon trials for libels in former times; for according to Lord RAYMOND in Franklin's case (as cited by the learned *judge at Shrewsbury), the principle now contended for had it seems been only broached about the year 1731, by some men of party spirit, [*153] and then too for the very first time.

Such an observation in the mouth of Lord RAYMOND proves how dangerous it is to take up as doctrine everything flung out at *Nisi Prius*; above all upon subjects which engage the passions and interests of government. Because the most solemn and important trials with which history makes us acquainted, discussed, too, at the bar of this Court, and when filled with judges the most devoted to the crown, give the most decisive contradiction to such an unfounded and unguarded assertion.

In the famous case of the seven bishops, the question of libel or no libel was held unanimously by the Court of King's Bench, trying the cause at the bar, to be matter for the consideration and determination of the jury; and the bishop's petition to the king, which was the subject of the information, was accordingly delivered to them, when they withdrew to consider of their verdict.

Thinking this case was decisive, it was cited at the trial; and the answer it received from Mr. Bearcroft was, that it had no relation to the point in dispute, for that the bishops were acquitted, not upon the question of libel, but because the delivery of the petition to the king was held to be no publication.

But from the history of the case in the fifth volume of the State Trials it appears, that the publication was expressly proved; that nothing turned upon it in the judgment of the Court; and that the charge turned wholly upon the question of libel, which was expressly left to the jury by every one of the judges. Lord Chief Justice WRIGHT, in summing up the evidence, told them that a question had at first arisen about the publication, it being insisted on that the delivery of the petition to the king had not been proved; that the Court was of the same opinion; and that he was just going to have directed them to find the bishops not guilty, when my Lord President came in, who proved the delivery to his majesty. "Therefore," continued the Chief Justice, "if you believe it was the same petition, it is a publication sufficient, and we must therefore come to inquire whether it be a libel."

He then gave his reasons for thinking it within the case *de libellis fumosis*, and concluded by saying to the jury, "In short, I must give you my opinion: I do take it to be a *libel; if my brothers have anything to say to it, [*154] I suppose they will deliver their opinion." What opinion? not that the jury had no jurisdiction to judge of the matter, but an opinion for the express purpose of enabling them to give that judgment which the law required at their hands.

Mr. Justice HOLLOWAY then followed the Chief Justice; and so pointedly was the question of libel or no libel, and not the publication, the only matter which remained in doubt, and which the jury with the assistance of the Court were to decide upon, that when the learned judge went into the facts which had been in evidence, the Chief Justice said to him, "Look you, by the way, brother, I did not ask you to sum up the evidence, but only to deliver your opinion to the jury, whether it be a libel or no." The Chief Justice's remark, though it proves my position, was however very unnecessary; for but a moment before Mr. Justice HOLLOWAY had declared he did not think it was a libel, but addressing himself to the jury, he had said, "*It is left to you, gentlemen.*"

Mr. Justice POWELL, who likewise gave his opinion that it was no libel, said to the jury, "*But the matter of it is before you, and I leave the issue of it to God and your own consciences.*" And so little was it in the idea of any one of the Court, that the jury ought to found their verdict solely upon the evidence of the publication, without attending to the criminality or innocence of the petition, that the Chief Justice himself consented, on their withdrawing from the bar, that they should carry with them all the materials for coming to a judgment as comprehensive as the charge; and indeed expressly directed that the information, the libel, the declarations under the great seal, and even the statute-book should be delivered to them.

Again, in Tutchin's case, Lord HOLT left the question of libel to the jury in the most unambiguous terms. After summing up the evidence of writing and publishing, he said to them as follows:—"You have now heard the evidence, and you are to consider whether Mr. Tutchin be guilty. They say they are innocent papers, and no libel; and they say nothing is a libel but what reflects upon some particular person. But this is a very strange doctrine, to say, it is not a libel reflecting on the government, endeavoring to possess the people that the government is mal-administered by corrupt [*155] persons, that are employed in such or such stations either in the navy or army. To say that corrupt officers are *appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it; and nothing can be worse to any government than to endeavor to procure animosities as to the management of it: this has been always looked upon as a crime, and no government can be safe without it be punished."

Having made these observations, did the Chief Justice tell the jury, that whether the publication in question fell within that principle, so as to be a libel on government, was a matter of law for the Court, with which they had no concern? Quite the contrary: he considered the seditious tendency of the paper as a question for their sole determination, saying to them—

"Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government. To tell us that those that are employed know nothing of the matter, and those that do know are not employed; men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places; this is the purport of these papers."

In citing the words of judges in judicature, we have a right to suppose their course to be pertinent and relevant, and that when they state the defendant's answer to the charge, and make remarks on it, they mean that the jury should exercise a judgment under their direction: this is the practice we must certainly impute to Lord HOLT, if we do him the justice to suppose that he meant to convey the sentiments which he expressed. So that when he came to sum up this case, we are not so far behind the learned gentleman even in point of express authority; putting all reason and the analogies of law, which unite to support me, wholly out of the question.

There is Court of King's Bench against Court of King's Bench; Chief Justice WRIGHT against Chief Justice LEE; and Lord HOLT against Lord RAYMOND.

But even if the case were otherwise in that particular, we cannot consent implicitly to receive any doctrine as the law of England, though pronounced to be such by magistrates the most respectable, if we find it to be in direct [*156] violation of *the very first principles of English judicature. The great jurisdictions of the country are unalterable but by parliament, and until they are changed by that authority, they ought to remain sacred; the

judges have no power over them. What parliamentary abridgment has been made upon the rights of juries since the trial of the bishops, or since Tutchin's case, when they were fully recognised by this Court? None. Lord RAYMOND and Lord Chief Justice LEE ought therefore to have looked there to their predecessors for the law, instead of setting up a new one for their successors.

But supposing the Court should deny the legality of all these propositions, or, admitting their legality, should resist the conclusions I have drawn from them, there remains the last proposition, which is supported even by all those authorities on which the learned judge relies for the doctrines contained in his charge; to wit,

"That in all cases where the mischievous intention (which is agreed to be the essence of the crime) cannot be collected by simple inference from the fact charged, because the defendant goes into evidence to rebut such inference, the intention becomes then a pure unmixed question of fact, for the consideration of the jury."

In *Rex v. Woodfall*, your lordship expressed yourself thus: "Where an act, in itself indifferent, becomes criminal when done with a particular intent, there the intent must be proved and found. But where the act is itself unlawful (as in the case of a libel) the PROOF of justification or excuse lies on the defendant; and in failure thereof the law implies a criminal intent." Most luminously expressed to convey this sentiment, viz., that when a man publishes a libel, and has nothing to say for himself, no explanation or exculpation, a criminal intention need not be proved. We freely admit that it need not; it is an inference of common sense, not of law. But the publication of a libel does not exclusively show criminal intent, but is only an implication of law, in failure of the defendant's proof. Your lordship immediately afterwards, in the same case, explained this further. "There may be cases where the publication may be justified or excused as lawful OR INNOCENT; FOR NO FACT WHICH IS NOT CRIMINAL, though the paper BE A LIBEL, can amount to such a publication of which the defendant ought to be found guilty." But no question of that kind arose at the trial (i. e. on the trial of *Woodfall*). Why? Your lordship immediately explained "why, "Because the defendant called no witnesses;" expressly saying that the publication of a libel is not in itself a crime, unless the intent be criminal. And that it is not merely in mitigation of punishment, but that such a publication does not warrant a verdict of guilty.

In the case of *Rex v. Almon*, a magazine containing one of Junius's letters was sold at Almon's shop; there was proof of that sale at the trial. Mr. Almon called no witnesses, and was found guilty. To found a motion for a new trial, an affidavit was offered from Mr. Almon, that he was not privy to the sale, nor knew his name was inserted as a publisher; and that this practice of booksellers being inserted as publishers by their correspondents, without notice, was common in the trade.

Your lordship said, "Sale of a book in a bookseller's shop is *primâ facie* evidence of publication by the master, and the publication of a libel is *primâ facie* evidence of criminal intent: it stands good till answered by the defendant: it must stand, till contradicted or explained, and if not contradicted, explained, or exculpated, becomes tantamount to conclusive, when the defendant calls no witnesses."

Mr. Justice ASTON said, "*Primâ facie* evidence not answered is sufficient to ground a verdict upon: if the defendant had a sufficient excuse, he might have proved it at the trial: his having neglected it where there was no surmise is no ground for a new one." Mr. Justice WILLES and Mr. Justice ASHURST agreed upon those express principles.

These cases declare the law, beyond all controversy, to be, that publication, even of a libel, is no conclusive proof of guilt, but only *prima facie* evidence of it till answered; and that, if the defendant can show that his intention was not criminal, he completely rebuts the inference arising from the publication; because, though it remains true that he published, yet according to your lordship's express words, it is not such a publication of which a defendant ought to be found guilty. Apply Mr. Justice BULLER's summing to this law, and the slightest attention will distinguish the repugnancy.

The advertisement was proved, to convince the jury of the dean's motive for publishing; Mr. Jones's testimony went strongly to it, and the evidence to character, though not sufficient in itself, was admissible to be thrown into the scale. But not only no part of this was left to the jury, but the [*158] *whole of it was expressly removed from their consideration, although in the cases of Woodfall and Almon it was as expressly laid down to be within their cognizance, and a complete answer to the charge, if satisfactory to the minds of the jurors.

In support of the learned judge's charge there can be, therefore, but the two arguments: either that the defendant's evidence, namely the advertisement, Mr. Jones's evidence in confirmation of its being *bona fide*, and the evidence to character, to strengthen that construction, were not sufficient proof that the dean believed the production meritorious, and published it in vindication of his honest intentions; or else, that even admitting it to establish that fact, it did not amount to such an exculpation as to be evidence on not guilty, so as to warrant a verdict. The counsel for the prosecution may take the choice of the alternative.

As to the first, viz. whether it showed honest intention in point of fact, that was a question for the jury. If the learned judge had thought it was not sufficient evidence to warrant the jury's believing that the dean's motives were such as he had declared them, he should have given his opinion of it as a point of evidence, and left it there. To go further, would be to argue a self-evident proposition.

As to the second, viz. that even if the jury had believed, from the evidence, that the dean's intention was wholly innocent, it would not have warranted them in acquitting, and, therefore, should not have been left to them upon not guilty; that argument can never be supported. For if the jury had declared, "We find that the dean published this pamphlet; whether a libel or not we do not find: and we find further, that believing it in his conscience to be meritorious and innocent, he, *bona fide*, published it, with the prefixed advertisement, as a vindication of his character from the reproach of seditious intentions, and not to excite sedition:" it is impossible to say, without ridicule, that on such a special verdict the Court could have pronounced a criminal judgment.

Then why was the consideration of that evidence by which those facts might have been found withdrawn from the jury, after they brought in a verdict guilty of publishing *only*, which in *Rex v. Woodfall* was only said not to negative the criminal intention, because the defendant called no witnesses? Why did the learned judge confine his inquiries to the *innuendoes*, and finding them agreed in, direct the *epithet of guilty, without asking [*159] the jury if they believed the defendant's evidence to rebut the criminal inference? Some of them positively meant to negative the criminal inference, by adding the word "only," and all would have done it, if they had thought themselves at liberty to enter upon that evidence. But they were told expressly that they had nothing to do with the consideration of that evidence, which, if believed, would have warranted that verdict. The con-

clusion is evident: if they had a right to consider it, and their consideration might have produced such a verdict, and if such a verdict would have been an acquittal, it must be a misdirection.

"But," it has been said, "if this advertisement, prefixed to the publication, by which the dean professed his innocent intention in publishing it, should have been left to the jury as evidence of that intention, to found an acquittal on, even taking the dialogue to be a libel, no man could ever be convicted of publishing anything, however dangerous: for he would only have to tack an advertisement to it by way of preface, professing the excellence of its principles and the sincerity of its motives, and his defence would be complete."

We do not contend for any such position. If a man of education, like the dean, were to publish a writing so palpably libellous, that no ignorance or misapprehension imputable to such a person could prevent his discovering the mischievous design of the author; no jury would believe such an advertisement to be *bonâ fide*, and would therefore be bound in conscience to reject it, as if it had no existence; the effect of such evidence must be, to convince the jury of the defendant's purity of mind, and must therefore depend upon the nature of the writing itself, and all the circumstances attending its publication.

If, upon reading the paper, and considering the whole of the evidence, they have reason to think that the defendant did not believe it to be illegal, and did not publish it with the seditious purpose charged by the indictment, he is not guilty upon any principle or authority of law, and would have been acquitted even in the Star-Chamber: for it was held by that court in Lambe's case, in the eighth year of King James the First, as reported by Lord Coke, who then presided in it, M. 8 Jac. 1, 9 Co. 59, b, that every one who should be convicted *of a libel must be the writer or contriver, or a *malicious publisher, knowing it to be a libel.* [*160]

This case of Lambe being of too high authority to be opposed, and too much in point to be passed over, it has been endeavored to avoid its force by giving it a new construction, and saying that not knowing a writing to be a libel, in the sense of that case, means, not knowing the contents of the thing published; as by conveying papers sealed up, or having a sermon and a libel, and delivering one by mistake for the other. In such cases it is said *ignorantia facti excusatur*, because the mind does not go with the act; *sed ignorantia legis non excusatur*; and therefore if the party knows the contents of the paper which he publishes, his mind goes with the act of publication, though he does not find out anything criminal, and he is bound to abide by the legal consequences.

This is to make criminality depend upon the consciousness of an act, and not upon the knowledge of its quality, which would involve lunatics and children in all the penalties of criminal law: for whatever they do is attended with consciousness, though their understanding does not reach to the consciousness of offence.

The publication of a libel, not believing it to be one after having read it, is a much more favorable case than publishing it unread by mistake; the one, nine times in ten, is a culpable negligence, which is no excuse at all; for a man cannot throw papers about the world without reading them, and afterwards say he did not know their contents were criminal: but if a man reads a paper, and, not believing it to contain anything seditious, having collected nothing of that tendency himself, publishes it among his neighbors as an innocent and useful work, he cannot be convicted as a criminal publisher. How he is to convince the jury that his purpose was innocent, though the thing published be a libel, must depend upon circumstances; and these circumstances he may, on the authority of all the cases, ancient and

modera, lay before the jury in evidence; because, if he can establish the innocence of his mind, he negatives the very gist of the indictment.

"In all crimes," says Lord HALE in his Pleas of the Crown, "the intention is the principal consideration: it is the mind that makes the taking of another's goods to be felony, or a bare trespass only: it is impossible to [*161] prescribe *all the circumstances evidencing a felonious intent, or the contrary; but the same must be left to the attentive consideration of judge and jury: wherein the best rule is, *in dubiis*, rather to incline to acquittal than conviction," 1 H. Pl. Cr. 509.

In the same work he says, "By the statute of Philip and Mary touching importation of coin, counterfeit of foreign money, it must, to make it treason, be with the intent to utter and make payment of the same; and the intent in this case may be tried and found by circumstances of FACT, by words, letters, and a thousand evidences besides the bare doing of the fact. 1 H. Pl. Cr. 229.

This principle is illustrated by frequent practice, where the intention is found by the jury as a fact in a special verdict.

It occurred not above a year ago, at East Grinstead, on an indictment for burglary, before Mr. Justice ASHURST. It was clear upon the evidence that he had broken into the house by force in the night; but it was contended that it appeared from proof, that he had broken and entered with an intent to rescue his goods, which had been seized that day by the officers of excise; which rescue, though a capital felony by modern statute, was but a trespass in the time of Hen. 8, and consequently not a burglary.

Mr. Justice ASHURST saved this point of law, which the twelve judges afterwards determined for the prisoner; but in order to create the point of law, it was necessary that the prisoner's intention should be ascertained as a fact; and for this purpose the learned judge directed the jury to tell him with what intention they found that the prisoner broke and entered the house, which they did by answering, "To rescue his goods;" which verdict was recorded.

In the same manner, in the case of *Rex v. Pierce*, at the Old Bailey, the intention was found by the jury as a fact in the special verdict. The prisoner having hired a horse, and afterwards sold him, was indicted for felony; but the judges doubting whether it was more than a fraud, unless he originally hired him intending to sell him, recommended it to the jury to find a special verdict, comprehending their judgment of his intention from the evidence. Here the quality of the act depended on the intention; which intention it was held to be the exclusive province of the jury to determine, before the judges could give the act any legal denomination.

[*162] *The whole mistake arises from confounding criminal with civil cases. If a printer's servant, without his master's consent or privity, inserts a slanderous article against me in his newspaper, I ought not in justice to indict him; and if I do, the jury on *such proof* should acquit him; but it is no defence to an action, for he is responsible, to me *civilliter*, for the damage which I have sustained from the newspaper, which is his property. Is there anything new in this principle? So far from it, that every student knows it as applicable to all other cases: but people are resolved, from some fatality or other, to distort every principle of law into nonsense, when they come to apply them to printing; as if none of the rules and maxims which regulate all the transactions of society had any reference to it.

If a man, rising in his sleep, walks into a china shop, and breaks everything about him, his being asleep is a complete answer to an indictment for a trespass; but he must answer in an action for everything he has broken.

If the proprietor of the York coach, though asleep in his bed at that city,

has a drunken servant on the box in London, who drives over my leg and breaks it, he is responsible to me in damages for the accident; but I cannot indict him as the criminal author of my misfortune. What distinction can be more obvious and simple?

Let us only then extend these principles, which were never disputed in other criminal cases, to the crime of publishing a libel; and let us at the same time allow to the jury, as our forefathers did before us, the same jurisdiction in that instance which we agree in rejoicing to allow them in all others, and the system of English law will be wise, harmonious, and complete.

Welch was on the same side.

LORD MANSFIELD.—The motion to set aside the verdict, and to grant a new trial, upon account of the misdirection of the judge, supposes that upon this verdict (either as a general, or as minutes of a special verdict to be reduced into form) judgment may be given; for if the verdict was defective, and omitted finding anything within the province of the jury to find, there ought to be a *venire de novo*. Consequently this motion is totally improper.

I think the objections may be reduced to four in number.

The *first* is peculiar to this case, and therefore I begin with it, viz., *That the judge did not leave the evidence of a *lawful excuse or justification to the jury, as a ground for them to acquit the defendant upon, or as [*163] a matter for their consideration.* This is an objection peculiar to this case, and therefore I begin with it, to dispose of it first. Circumstances merely of alleviation or aggravation are irrelevant upon the trial; they are totally immaterial to the verdict, because they do not prevent or conclude the jury's finding for or against the defendant. They may be made use of when judgment is given, to increase or lessen the punishment. Circumstances which amount to a lawful excuse, or a justification, are proper upon the trial, and can only be used there. Upon every such defence set up of a lawful excuse or justification, there necessarily arise two questions, one of law, the other of fact; the first to be decided by the Court, the second by the jury.

Whether the fact alleged, supposing it true, be a legal excuse, is a question of law; whether the allegation be true, is a question of fact; and, according to this distinction, the judge ought to direct, and the jury ought to follow the direction; though by means of a general verdict they are intrusted with a power of blending law and fact, and following the prejudices of their affections or passions.

The first circumstance in evidence in this cause is the letter of the 24th of January to Edwards, and the advertisement that accompanied it. Upon this part of the case we must suppose the paper seditious or criminal; for if it is neither seditious nor criminal the defendant must be acquitted upon the face of the record. Therefore, whether it is an excuse or not, we must suppose the paper to be a libel, or criminal in the eye of the law. Then how does it stand upon this excuse? why, the defendant, knowing the paper had been strongly objected to, as tending to sedition, or that it might be so understood, publishes it with an advertisement, avowing and justifying the doctrine.

The next circumstance is, from the evidence of Edward Jones, that the defendant was told and knew that the paper was objected to as having a seditious tendency; that it might do mischief, if it was translated into Welsh, and therefore that design was laid aside; that he read it at the county meeting, and said he read it *with a rope about his neck*; and after he read it, he said *it was not so bad*. And this he knew upon the 7th of January; yet he sets this up as **an excuse for ordering it to be printed* [*164] upon the 24th of January.

We are all clearly of opinion, that if the writing be criminal, these circumstances are aggravations, and by no means ought to have been left to the jury as any excuse. It is a mockery to say it is any excuse. What! when the man himself knows that he reads it *with a rope about his neck*; when he says, admitting it to be bad, that it is not *so bad*; when he has told a company of gentlemen, that for fear of its doing mischief to their country he would not have it translated into Welsh. All these circumstances plainly showed him that he should not have published it. Therefore we are all of opinion, it is the same as if no such evidence had been given, and that, if it had been opened by way of excuse, it ought not to have been received. The advertisement was read to the jury, but the judge did very right not to leave it to them as a matter of excuse, because it was clearly of a contrary tendency.

What was meant by saying the advertisement should have been set out in the indictment I do not comprehend; much less that blasphemy may be charged on the Scripture by only stating half the sentence.

If any part of the sentence qualifies what is set forth, it may be given in evidence, as was expressly determined by the Court so long ago as the case of *Rex v. Bear*, in the reign of King William, B. R. 10 Will. 2 Salk., 417. Every circumstance which tends to prove the meaning is every day given in evidence, and the jury are the only judges of the meaning, and must find the meaning. If they do not find the meaning, the verdict is not complete.

The *second* objection is, that the judge did not give his own opinion, whether the writing was a libel, or seditious, or criminal.

The *third*, that the judge told the jury that they ought to leave that question upon record to the Court, if they had no doubt of the meaning and publication.

The *fourth* and last, that he did not leave the defendant's intent to the jury.

The answer to these three objections is, that by the constitution the jury [165] ought not to decide the question of law, *whether such a writing, of such a meaning, published without a lawful excuse, be criminal. They cannot decide it against the defendant, because after the verdict it remains open upon the record; therefore it is the duty of the judge to advise the jury to separate the question of fact from the question of law; and, as they ought not to decide the law, and the question remains entire upon the record, the judge is not called upon necessarily to tell them his own opinion. It is almost peculiar to the form of the prosecution for a libel, that the question of law remains entirely for the Court *upon the record*, and that the jury cannot decide it against the defendant; so that a general verdict "that the defendant is guilty" is equivalent to a special verdict in other cases. It finds all which belongs to the jury to find; and finds nothing as to the question of law. Therefore, when a jury have been satisfied as to every fact within their province to find, they have been advised to find the defendant *guilty*, and in that shape they take the opinion of the Court upon the law. No case has been cited of a special verdict in a prosecution for a libel leaving the question of law upon the record to the Court, though, to be sure, it might be left in that form; but the other is simpler and better.

As to the last objection upon the *intent*: A criminal intent, from doing a thing criminal in itself, without a lawful excuse, is an inference of law, and a conclusive inference of law, not to be contradicted but by an excuse, which I have fully gone through. Where an *innocent act* is made criminal, when done with a particular intent, there the intent is a *material fact* to constitute the crime. This is the answer that is given to these three last objections to the direction of the judge. The first I said was peculiar to this case.

The subject-matter of these three objections has arisen upon every trial for a libel since the Revolution, which is now near a hundred years ago. In every reign there have been many such trials, both of a private and a public nature. In every reign there have been several defended with all the acrimony of party animosity, and a spirit ready to contest every point, and to admit nothing. During all this time, as far as it can be traced, one may venture to say, that the direction of every judge has been consonant to the doctrine of Mr. Justice BULLER; and no counsel has complained of it by any application to the Court. The counsel for the *crown, to remove the prejudices of a jury, and to satisfy the bystanders, have expatiated upon the enormity of the libels; judges with the same view have sometimes done the same thing; both have done it wisely, with another view—to obviate the captivating harangues of the defendants' counsel to the jury, tending to show that they can or ought to find that in law the paper is no libel.

But the formal direction of every judge (under which every lawyer for near a hundred years has so far acquiesced as not to complain of it to the Court) seems to me, ever since the Revolution, to have been agreeable to the direction of Mr. Justice BULLER. It is difficult to cite cases; the trials are not printed. Unless particular questions arise, notes are not taken; nobody takes a note of a direction of course, not disputed. We must, as in all cases of tradition, trace backwards, and presume, from the usage which is remembered, that the precedent usage was the same.

We know there were many trials for libels in the reign of King William; but there is no trace, that I know of, of any report that at all bears upon the question during that reign, except the case of *Rex v. Bere* (Salk.), and the only point there applicable to the present case was, whether the writing complained of must be set out according to the *tenor*. Why? That the Court might judge of the very words themselves; whereas, if it was to be according to the *effect*, that judgment must be left to the jury. It was determined that the *tenor* must be set out, and under that authority ever since the writing complained of is set out in that manner.

During the reign of Queen Anne we know several trials were had for libels, but the only one cited is in the year 1704; and there the direction (though Lord HOLT, who is said to have done it in several cases, goes into the enormity of the libel) to the jury was, "If you find the publication in London, you must find the defendant guilty." Thus it stands, as to all that can be found precisely and particularly in those two reigns. In the reign of George I. there were several trials for libels, but I have seen no note or traces of them, nor any question concerning them. In the reign of George II. there were others; but the first of which there is a note (for which I am obliged to Mr. Manley), was in February, 1729, *Rex v. Clarke*, which was tried before Lord Chief Justice RAYMOND; and there he lays it down *expressly (there being no question about an excuse or about the meaning), that the *fact of printing and publishing only is in issue*. [*167]

The *Craftsman* was a celebrated party paper, written in opposition to the ministry of Sir Robert Walpole, by many men of high rank and great talents; the whole party espoused it. It was thought proper to prosecute the famous *Hague Letter*. I was present at the trial; it was in the year 1731. It happens to be printed in the *State Trials*. There was a great concourse, great expectation, and many persons of high rank were present to countenance the defendant. Mr. Fazakerly and Mr. Bootle (afterwards Sir Thomas Bootle) were the leading counsel for the defendant. They started every objection and labored every point. When the judge overruled them, he usually said, "If I am wrong, you know where to apply." The judge was my Lord

RAYMOND, who had been eminent at the bar in the reign of Queen Anne, had been Solicitor and Attorney-General in the reign of George I., and was intimately connected with Sir Edward Northey,¹ so that he must have known what the ancient practice had been. The case itself was of great expectation, as I have stated to you, and it was so blended with party passion, that it required his utmost attention; yet when he came to sum up and direct the jury, he does it, as of course, just in the same manner as Mr. Justice BULLER did, "that there were three points for consideration; the fact of publication; the meaning (those two for the jury); the question of law or criminality, for the Court upon the record." Mr. Fazakerly and Mr. Bootle were, as we all know, able lawyers; they were connected in party with the writers of the Craftsman. They never thought of complaining to the Court; they would not say it was not law. Except that case in 1729, and this, the trials for libels before Lord RAYMOND are not printed, nor to be found in any notes. But, to be sure, his direction in all was to the same effect. I, by accident (from memory only I speak now), recollect one where the Craftsman was acquitted; and I recollect it from a famous, witty, and ingenious ballad that [*168] was made at the *time by Mr. Pulteney; and though it is a ballad, I will cite the stanza I remember from it, because it will show you the idea of the able men in opposition, and the leaders of the popular party in those days. They had not an idea of assuming that the jury had a right to determine upon a question of law, but they put it upon another and much better ground. The stanza I allude to is this:

"For Sir Philip^a well knows
His innuendoes
Will serve him no longer
In verse or in prose;
For twelve honest men have decided the cause,
Who are judges of fact, though not judges of laws."^b

It was the admission of the whole of that party; they put it right, they put it upon the *meaning* of the *innuendoes*; upon *that* the jury acquitted the defendant; and they never pretended that the jury had any other power, except when talking to the jury themselves.

There are no notes that I know of (and I think the bar would have found them out upon this occasion, if there had been any that were material), of the trials for libels before Lord HARDWICKE, or at least not before Lord Chief Justice LEE, till the year 1752, when the case of *Rex v. Owen* came on before him. This happens to be printed in the *State Trials*; though it is incorrect, but sufficient for the present purpose. I attended that trial as Solicitor-General. Lord Chief Justice LEE was the most scrupulous observer and follower of precedents, as he directed the jury, as of course, in the same way Mr. Justice BULLER has done.

When I was Attorney-General, I prosecuted some libels; one I remember, from the condition and circumstances of the defendant; he was found guilty.

¹ It is observable, that on the trial of Tutchin before Lord HOLZ, Sir Edward Northey, then Attorney-General, insisted, that the only question was, whether the defendant was the author of the papers; and he does not appear to have been contradicted by Lord HOLZ. 5 St. Tr. 580.

² Sir Philip Yorke, afterwards Lord Chancellor HARDWICKE, then Attorney-General.

³ It is suggested in Ridgway's edition of Erskine's speeches, that this ballad is misquoted; for that the last verse runs thus:

"Who are judges *allike* of the fact and the laws."

This version does not seem so consistent with the preceding lines of the ballad; for innuendoes are clearly in the province of the jury.

He was a common councilman of the city of London : and I remember another circumstance ; it was the first conviction in the city of London for twenty-seven years. It was the case of *Rex v. Nutt* ; and *there the defendant was convicted, under the very same direction, by Lord Chief Justice RYDER. [*169]

- In the year 1766 I came into the office I now hold. Upon the first prosecution for a libel which stood in my paper, I am not sure, but I think it was the case of *Rex v. Shebbeare*, I made up my mind as to the direction I ought to give. I have uniformly given the same in all, almost in the same form of words. No counsel ever complained of it to the Court. Upon every defendant being brought up for judgment, I have always stated the direction I gave ; and the Court has always assented to it. The defence of a lawful excuse never existed in any case before me ; therefore I have told the jury, if they were satisfied with the evidence of the publication, and that the meanings of the *innuendoes* were as stated, they ought to find the defendant guilty ; that the question of law was upon record for the judgment of the Court. This direction being as of course, and no question ever raised concerning it in Court (though I have had the misfortune to try many libels in very warm times against defendants most obstinately and factiously defended), there are no notes of what passed. In one case, of *Rex v. Woodfall*, on account of a very different kind of question, there happens to be a report ; and there the direction I have stated is adopted by the whole Court as right, and the doctrine of Mr. Justice BULLER is laid down in express terms.

Such a judicial practice, in the precise point, from the Revolution, as I think, down to the present day, is not to be shaken by arguments of general theory, or popular declamation.

Every species of criminal prosecution has something peculiar in the mode of procedure ; therefore general propositions, applied to all, tend only to complicate and embarrass the question. No deduction or conclusion can be drawn from what a jury *may* do, from the *form* of procedure, to what they *ought* to do upon the fundamental principles of the constitution and the reason of the thing, if they will act with integrity and good conscience.

The fundamental definition of trial by jury depends upon a universal maxim that is without an exception. Though a definition, or maxim in law, without an exception, it is said, is hardly to be found, yet this I take to be a maxim without an exception, *Ad questionem juris non respondent iuratores ; ad questionem facti non respondent iudices*.

*Where the questions can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury can- [*170] not encroach upon the jurisdiction of the Court ; where by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts, that under the direction of a judge they will not usurp a jurisdiction which is not in their province. They do not know, and are not sworn to decide, the law ; they are not required to do it. If it appears upon the record, they ought to leave it there, or they may find the facts subject to the opinion of the Court upon the law. But further, upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of the law. As I said before, they do not know, and are not presumed to know, anything of the matter ; they do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by but their affections and wishes. It is said, if a man gives a right sentence upon hearing one side only, he is a wicked judge, because he is right by chance only, and has neglected taking the proper method to be informed. So the jury who usurp the judicature of law, though

they happen to be right, are themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.

To be free is to live under a government by law. The liberty of the press consists in printing without any previous license, subject to the consequences of law. The licentiousness of the press is Pandora's box, the source of every evil. Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of law, to protect individuals, or to guard the state.

Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is now, in the present state of things, puerile rant and declamation. The judges are totally independent of the ministers that may happen to be, and of the king himself. Their temptation is rather to the popularity of the day. But I agree with the observation cited by Mr. *COWPER from [171] Mr. Justice FORSTER, "that a popular judge is an odious and a pernicious character."

The judgment of the Court is not final; in the last resort it may be reviewed in the House of Lords, where the opinion of all the judges is taken.

In opposition to this, what is contended for?—That the law shall be, in every particular cause, what any twelve men, who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

I am glad that I am not bound to subscribe to such an absurdity, such a solecism in politics; agreeable to the uniform judicial practice since the Revolution, warranted by the fundamental principles of the constitution, of the trial by jury, and upon the reason and fitness of the thing, I am of opinion that this motion should be rejected and the rule discharged.

WILLES, Justice.—Before I enter upon the propriety of my learned brother's direction to the jury in this case, I think it incumbent upon me to express unequivocally my sentiments as to two propositions that I conceive to be law. In the first place, I conceive it to be the law of this country, that the jury, upon a plea of not guilty, or upon the general issue, upon an indictment or information for a libel, have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof given of the publication. Secondly, I conceive it to be law, that if upon such examination the jury should, contrary to the judge's direction, acquit the defendant generally, such a jury are not liable either to attain, fine, or imprisonment; nor can this Court set aside the verdict of deliverance by a new trial, or by any other means whatsoever.

As to the first proposition, I believe no man will venture to say they have not the power, but I mean expressly to say they have the right. Where a civil power of this sort has been exercised without control, it presumes, nay, by continual usage, it gives the right. It was the right which juries exercised in those times of violence, when the seven bishops *were tried, [172] and which even the partial judges who then presided did not dispute, but authorized them to exercise, upon the subject-matter of the libel; and the jury, by their solemn verdict upon that occasion, became one of the happy instruments, under Providence, of the salvation of this country. This privilege has been assumed by the jury in a variety of ancient and modern

instances, and particularly in the case of *Rex v. Owen*, without any correction or even reprimand of the Court. It is a right, for the most cogent reasons, lodged in the jury; as without this restraint the subject in bad times would have no security for his life, liberty, or property. I will put a strong case to this purpose: Suppose we had lived in the reign of the Stuarts, and any of the great patriots in those days had, in a public paper, charged the king and government with divers acts of tyranny and oppression, and the Attorney-General for the crown had prosecuted this paper for a libel, and the jury, upon the trial, had been told, that if the fact of publication and the *innuendoes* were proved, they must find the defendant guilty, and then the record had come back to the Court for them to decide, whether, in point of law, this was a libel; the most upright judge that ever sat must have pronounced, according to the strict rules of law, that this was a libel: or probably the Court might have been wise enough to have said something like the opinion in 2 Strange, 834, upon another subject: "We will not suffer it to be argued, whether calling our gracious sovereign an arbitrary prince is not an offence." But the jury are not so restrained, because they resort to evidence, as by law they have a right; that is, to go according to their own knowledge, and therefore they may find that which by the indictment is called false and seditious not to be so; they may indirectly say, "We know it to be true, and written for the most salutary purposes."

"As a confirmation of this doctrine, I will only mention Mr. Justice BLACKSTONE's opinion, where he says, "The excellence of the trial by jury holds much stronger in criminal cases, since in times of difficulty and danger more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another in civil matters." 4 Bl. Comm. 349, 3 Bl. Comm. 349, 379. Mr. Justice BLACKSTONE, we all *know, was an anti-republican lawyer; and yet these are his sentiments. I am sure no [*173] danger of this sort is to be apprehended from the judges of the present age; but, in our determinations, it will be prudent to look forward into futurity. I will not repeat what Mr. *Bearcroft* said upon the trial: I am sure they are not only his private sentiments, but they are the sentiments of the greater part of Westminster Hall. I honor him for his candor and integrity of heart; he would not sacrifice his constitutional principles to the wishes of his client. As to the second proposition, I agree with the doctrine laid down by my Lord Chief Justice VAUGHAN, in *Bushell's* case, by which, and the uniform practice from that time, that proposition is established. These rights of juries have always been accounted sacred. I, who found them established upon these two great principles, will, as far as I can, deliver them down unimpaired to posterity.

I shall now proceed to examine my brother BULLER's direction to the jury at the trial of this cause; the objections to which seem to me to be two:

First, That he told the jury, "if they were satisfied of the truth of the innuendoes and the publication, they were bound, in point of law, to find the defendant guilty." Towards the conclusion of the summing up, he says, in clear words, "You ought to find him guilty."

The second objection is, that though the advertisement was admitted to be read, it was never summed up, or left to the jury for their consideration. As to the other objection, that the word *guilty* stands part of the verdict, I own I think it of no consequence; for if the jury only had found that "he printed and published," and the Court pronounced it a libel, I conceive in drawing up the judgment the word *guilty* would have been inserted.

As to the first objection, many great authorities have been stated in support of Mr. Justice BULLER's direction. The first is that of *Rex v. Franklin*.

It was a *dictum* at Nisi Prius: his lordship's words are very emphatical: "But there is a third thing, to wit, whether these defamatory expressions amount to a libel or not? This does not belong to the office of the jury, but to the office of the Court, because it is a matter of law, and not of fact, of which the Court are the only proper judges; and there is redress to be had in another place, if either of the parties are dissatisfied; for we are not to invade one another's province, as is now, of late, a notion among *some [*174] people who ought to know better; for matters of law and matters of fact are never to be confounded." 9 State Trials, 275.

I own I cannot subscribe my assent to the latitude in which his lordship lays down this doctrine, because I think there may be some cases, as murder, burglary, or forgery, where the jury find the law mixed with the fact, without invading the province of the judge; and that the jury might do it in a case of libel, was not, as his lordship says, a modern opinion, but the opinion of Lord HOLT, in summing up the evidence to the jury in the case of *Rex v. Tutchin*, in trial of a libel, part of which was scandalous and defamatory. He declared to them, that though the counsel for the defendant said this was an innocent paper, and no libel, it was, in his opinion, a libel reflecting upon the government. He afterwards proceeded, in these very words, to the jury: "You are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government." 5 State Trials, 542. His lordship could not have directed the jury to consider that, if he had thought that they had no right to consider it; such direction would, in that case, have been nugatory and absurd. This shows it was not an idea first taken up in 1731, only by those that ought to know better; but that it had received the sanction of law above twenty years before, in the year 1704 (the year of Tutchin's trial). Lord RAYMOND seems to have forgotten that the like idea was adopted by the judges in the case of the seven bishops. Lord Chief Justice LEE's direction, in the case of *Rex v. Owen*, in the State Trials, is very strong. It is delivered as his opinion, "that if the publication was proved, they cannot avoid bringing in the defendant guilty;" but the jury found Owen not guilty, and his lordship did not permit the Attorney-General to question them upon what particular part they found their verdict. It is said that Lord MANSFIELD, who is a great authority, has used the same direction in many cases before his lordship. The propriety of his directions would have great weight with me. They appear to have had the recognition of this Court in the case of *Rex v. Woodfall*. I had the honor to sit in this court at the time of that trial. It was not a pointed question, nor was the matter argued before the Court. So far as my [*175] opinion goes, I am still free *to confess I think it is fit, it is meet and prudent, that the jury should receive the law of libels from the Court. But if my concession is extended an *iota* further, to mean that under all the circumstances, if the *innuendoes* are proved, the jury are bound to find, and must find the defendant guilty, I must beg leave to repudiate the idea; as, upon the maturest consideration, I say the jury are not bound to find the defendant guilty, but may give a general verdict of acquittal, without being obliged to give their reasons. I am sure I am not singular in my opinion: I know it is the opinion of some of the most illustrious persons living, as well as of those of blessed memory who are dead.

I shall now revert to the judge's report. How stands the case upon that? My brother BULLER has directed the jury, in the terms used by many, if not all, of the judges, for above fifty years last past. It has never been my misfortune, since I have been a judge, to try a question of a political libel; therefore I never gave directions upon the subject. He has assured the Court, that he did not tell the jury "they had no right to find a verdict of not guilty." Could his direction be so misunder-

stood as to amount to that? I think it could not. Mr. *Bearcroft*, the counsel for the prosecution, in the strongest terms told the jury "they had a right to find a general verdict of acquittal;" which declaration is not negative or denied by the Court. Neither the judge nor the Court seem to have considered the contents of the dialogue, whether it was a libel or not.

By the first and informal verdict, which was tendered to the Court, but which was refused, the jury seem to have confined themselves to the publication only. The last finding is, "guilty of publishing, but whether a libel or not the jury do not find;" which is as much as to say, "we submit it to the Court." And in the long altercation between the judge and the jury, one of the jury expressly says, "So we leave it to the Court;" another was asked by Mr. *Erskine*, "Do you find sedition?" The answer is, "We give no verdict upon that." Supposing the right to give a general verdict of acquittal, which they were told by the counsel on both sides they had (though it is now said that this power should only be made use of where the magnitude of the subject and the times require such an exertion of legal and constitutional spirit), the present finding seems to be in the nature of a special verdict, which by law is left for the consideration *of the Court. I think, for this reason, the verdict should not be set aside. [*176]

As to the second objection, that the advertisement was not summed up to the jury, I think it a clear principle, that a libel may be excused or justified by the context, or other collateral matters; and whatever qualifies what is set forth may be given in evidence. In this case, the advertisement was read in order to palliate or excuse the contents of the paper. As to its not being summed up (though they were in possession of the contents), if the advertisement had been material to the defendant's justification, I think this would have been sufficient ground for a new trial; but upon reading the advertisement, I think that, instead of being a palliation or excuse, it is rather, as my lord says, an aggravation.

Then it appears, the defendant was told by some of his friends, this dialogue was thought seditious by some neighbors; therefore it would be better not to publish it in the Welsh language. The dean then reads it himself, and says, "I read it with a rope about my neck;" and after reading it, he expresses himself, by way of comment, "It is not so bad," and that therefore it was fit to be published for the vindication of the committee.

By his advertisement, he takes upon himself the risk of publication, whether it was libellous or not. If it contains nothing but what Lord *SOMERS* would have approved, and the convention parliament have warranted, then the publication is harmless and inoffensive; but if it tends to excite the people to take arms, to alter the established representation of this country without the consent of parliament, it may not only be seditious, but nearly treasonable. I give no opinion upon this head, as this will be a proper subject of discussion if a motion is made in arrest of judgment. At present it may suffice to say, I think the advertisement neither a justification, excuse, nor palliation of the dialogue. Therefore the not summing it up to the jury is no ground for a new trial, as on a future trial it ought to have no weight with the jury. The dean, by this advertisement, has appealed to the friends of the Revolution, whether this dialogue contains anything which has not the support of the highest authority, as well as the clearest reason. He has promulgated this challenge for the examination, and he must now abide the consequences of such examination.

ASHURST, Justice.—Lord *MANSFIELD* has gone so fully *into this question, that I should not have thought it necessary for me to say [*177] anything upon the subject, had not my brother *WILLES* disagreed with the Court as to the grounds on which their opinion is founded, though he concurs with them in thinking that a new trial ought not to be granted.

The different grounds on which a new trial has been moved for seem to me to be reducible to two heads.

First, That the judge was wrong in not summing up the advertisement, and leaving it to the jury (upon the evidence) to decide with what intention the paper was published.

Secondly, That the judge told the jury that they had nothing to do with the question of law, "whether it was a libel or not," but if they believed *the fact of publication*, they were bound to find the defendant guilty.

As to the first of these questions, my opinion is, that where the fact of publication is ambiguous (as where it may be a doubt whether the party pulled the paper out of his pocket by accident or on purpose, or whether he gave one paper instead of another, or any such supposable case), there the maxim holds that "*actus non facit reum, nisi mens sit rea.*"

But where the fact of publication is incontestable, there (if the paper which is the object of the information or indictment has upon the face of it a natural and obvious tendency to promote sedition, or to asperse the king and his government) it is no subject of inquiry, *by evidence*, whether the party had actually such an intention or not.

What passes in the mind of man is not scrutable by any human tribunal; it is only to be collected from his acts.

Every man (who is of sufficient understanding to be responsible for his actions) is supposed to be cognizant of the law, as it is the rule by which every subject of the kingdom is to be governed, and therefore it is his business to know it. If, therefore, a man publishes that which the law says is treasonable, seditious, or rebellious, the alleging in the indictment or information that the party did it with a libellous or seditious intent is a mere matter of legal inference from the fact of publication, and not the object of proof either on one side or the other.

If this were otherwise, upon what principle could a printer be the object of an indictment or information for printing a libel, who could prove by the clearest evidence, that at the time the paper came into his office and was [*178] printed, *he was sick in his bed, or absent from home? A man under such circumstances could not have any *actual* seditious or libellous intention;—but the law says he is answerable for the acts of those he employs, and therefore it is imputed to him as his own publication: and if so, the law supplies the intention.

This has, I believe, been often determined, and the language of the Court has been, that such circumstances may be material when he comes up for judgment, but can never go in excuse of the crime. Therefore I think it was not necessary for the judge to sum up this advertisement, as not amounting, in point of law, to any possible justification.

The utmost use that could be made of it would be in mitigation of punishment; though perhaps it may be doubtful whether any evidence offered by the defendant had any great tendency that way.

The second objection is, that the jury were told, that if they believed the fact of publication, they were bound to find the defendant guilty, and had nothing to do with the question of law, viz. whether the paper was a libel or not.

The gentleman who made the motion founds himself upon this principle, that upon every general issue the jury have (if they please) the right of taking cognizance both of the law and the fact, and finding as they think fit.

I admit the jury have the power of finding a verdict against the law, and so they have of finding a verdict against evidence, but I deny that they have a right to do so.

The principles of our constitution have defined the different provinces of

the Judges and the jury: *ad questiones juris respondeant iudices, ad questiones facti respondeant juratores.*

Did any lawyer ever contend that on the trial of an ejectment a jury had a right to determine upon the legal operation of a limitation in a deed, or will, or of a fine and recovery?—and yet the jury may disregard their duty, and find a general verdict for plaintiff or defendant, without attending to the direction of the judge as to the law.

But though the jury have the power of acting contrary to their duty, it does not prove that they have the right of judging upon any matter of law; concerning which *the judges alone have the right to decide.* In proof of this position, I will mention (as an additional authority) a late decision *in [*179] the Court of Common Pleas, on a motion for a new trial in the case of *Osborne v. Percival*, which was tried before me at Hertford. It was an action brought by a brewer against an excise officer, for a malicious prosecution for a supposed offence against the excise laws. The question turned upon the construction of the act of 8 & 9 Wm. 3. I thought that upon the true construction of the act the plaintiff was liable to prosecution; at all events there was a probable cause for the prosecution; and wherever that is the case, no action for a malicious prosecution will lie. I told the jury, that whether there was or was not a *probable cause* was a matter of law, which it was the province of the judge to determine; that it was my opinion there clearly was a probable cause, and therefore they must find for the defendant. But the jury would find a verdict for the plaintiff. The Court of Common Pleas, on the motion for a new trial, held, the jury were bound to take the direction of the judge on the question of law, and therefore granted a new trial.

This case is an additional authority as to the maxim, that the judges have the sole right to decide on all questions of law.

It may likewise tend to show, that it might not be any improvement in our constitution, to intrust juries with the right of deciding upon matters of law, especially in questions where their passions might be likely to take a part.

For my own part I shall always think that power is the most safely lodged in hands where it is subject to control. If the right of deciding upon the law of libels were lodged in the hands of the jury, and they (either from want of competent judgment, or from factious motives) wrongfully acquit the defendant, there is no appeal, there is no redress.

But if it is lodged in the hands where (as I conceive) the constitution has placed it, (namely) the judges,—if they should form a wrong judgment in pronouncing that to be a libel which is not so in point of law, the party has a right to carry it to a higher tribunal; and therefore it does not appear to me that any very alarming consequence can ensue if the right of deciding upon the law of libels remains in the same channel in which, as it appears from a series of determinations, for above a century, and which have been very fully stated by Lord MANSFIELD, it has been held to reside.

* Therefore, on the whole, I concur in thinking there is no ground [*180] for a new trial. The rule discharged.¹

¹ It was chiefly in consequence of the discussion occasioned by the case of the King v. Shipley, that the legislature passed the 23d G. 3, c. 60, entitled “An Act to remove Doubts respecting the Functions of Juries in Cases of Libel.”

BOGUE v. MILLES. Nov. 22.

If a defendant who is served with process in a wrong name appears by his right name, the irregularity is cured.

On Friday, the 12th of November, Cowper obtained a rule to show cause

why the proceedings in this case should not be stayed for irregularity, the defendant having been served by the name of James instead of John.

By the defendant's affidavit, on which the motion was made, and the copy of the bill of Middlesex, with which he had been served, it appeared that he was called James Milles in the body of the process, and in the direction at the bottom of it, and that he ordered his attorney to file bail for him, "as served by the name of James Milles" (which was accordingly done in those words, and the cause entitled "*Bogue v. John Milles, served by the name of James Milles*"), being advised to plead the misnomer in abatement; but that the plaintiff's attorney had in the mean time delivered a declaration in the cause, naming him John, and not James as in the process.

Runnington now showed cause.

Lord MANSFIELD.—As the process was served on the right person, though by a wrong name, and he has appeared to the action,¹ and is in court, the irregularity is cured.

The rule discharged.

¹ Otherwise where the plaintiff files common bail for the defendant. *Doo v. Butcher*, 3 T. R. 611. *S. P. Greenslade v. Rotheroe*, 2 N. R. 182.

[*181]

*REYNOLDS *v.* BEERING. Nov. 23.

1. It is no answer to a plea of set-off on a judgment recovered, that plaintiff has brought a writ of error to reverse the judgment, which is still pending.
2. If the plaintiff, in making up the record, makes the time of plea pleaded appear posterior to the date of the subject-matter pleaded, when it was not so in fact, the Court will direct an amendment at plaintiff's cost if he resists.
3. A judgment recovered after action brought and before plea pleaded is a good set-off.¹

THE declaration was entitled generally of Trinity term, and contained several counts in assumpsit, for work and labor, and goods sold and delivered.

The defendant pleaded a set-off of a promissory note, work and labor, goods sold and delivered, money had and received, and also, "that the defendant heretofore, to wit, on Friday next after eight days of the holy Trinity, in this same term, in the court of our Lord the King, before the King himself here, the said court then and still being holden at Westminster, in the county of Middlesex aforesaid, by the consideration and judgment of the same Court recovered against the plaintiff the further sum of £66 of like lawful money, which in and by the said Court of our Lord the King, before the King himself, was then and there adjudged to the said defendant for the damages which he had sustained, as well by reason of the not performing certain promises and undertakings then lately made by the said plaintiff to the said defendant, as for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted, as by the record and proceedings thereof still remaining in the said court of our said Lord the King, before the King himself here, to wit, at Westminster, in the county of Middlesex aforesaid, more fully and at large appears; which said judgment still remains in full force and effect, not in anywise reversed, satisfied, or otherwise vacated."

The plaintiff replied, as to all the other articles of set-off, that he was not then, nor at the time of exhibiting the plaintiff's bill, indebted to the defendant in the said sums, or either of them, and concluded to the country:—"And as to the said sum of £66 so recovered by the aforesaid judgment, in the said plea mentioned, he said, that afterwards, and after that judg-

¹ In *Evans v. Prosser*, 3 T. R. 186, this case, as to the third point, was overruled, and confirmed per BULLER, J., as to the first point.

ment so recovered, he duly prosecuted, out of the court of Chancery of our sovereign Lord the King, a *certain writ of error of and upon such judgment, in order to reverse the same, for manifest errors in giving [*182] the said judgment; and that such writ was duly allowed, and is still depending and undetermined, to wit," &c., and so concluded with a verification.

The defendant demurred generally to that last part of the replication.

[The case was first argued on Friday, the 19th of November.]

Shepherd, in support of the demurrer, contended, that nothing can be replied to a plea of set-off, which, if the defendant had brought an action on the ground of his set-off, could not have been pleaded in bar to that action. Now all the cases say that the pendency of a writ of error cannot be pleaded in bar to an action on the judgment on which the writ of error is brought. The writ of error only operates as a stay of execution; it does not annul the judgment; and even the stay of proceedings is not matter of right, for it is every day's practice to apply for the interposition of the Court to stay proceedings, till the writ of error shall be determined; and the Court generally, in granting the application, imposes terms on the party. If no such application is made, and the plaintiff obtains judgment in the second action, he may take out execution upon it notwithstanding the writ of error. If the plaintiff could avail himself of his writ of error in the present form, the statute of set-off would be entirely defeated; for a party, instead of pleading or giving notice of a counter-demand, would take his chance, and lie by till judgment should be entered up against him, then bring his action on his own demand, and hang up the judgment by writ of error.

Lane, for the plaintiff.—1. I admit that an action of debt may be maintained on a judgment notwithstanding a writ of error is depending on that judgment, though the courts were formerly very unwilling to suffer the plaintiff in such an action to take out execution. Thus, in the case of *Grandvill v. Dighton*, B. R. M. 5 W. & M. Skinn. 888, Comb. 229; 4 Mod. 247, by name of *Dighton v. Granville*, Lord Holt said, "If it were not for the current of authorities *contra*, it seemed hard to him that such an action lies; for the writ of error is a *supersedeas* to an execution, and therefore, *pari ratione*, it ought to be *a *supersedeas* to all the ways to come [*183] at an execution; and he cited the case of *Read v. Bearblock*, where a man pays a security of an inferior nature, pending a writ of error upon a judgment on a security of a higher nature, this was not a *devastavit*, which shows that the writ of error had so totally suspended the effect of the judgment, that it shall not have any regard or essence." However it is not now to be denied that the pendency of a writ of error is not a good plea in bar to an action on a judgment. It was determined, though with reluctance, in that very case of *Grandville v. Dighton*, that it cannot even be pleaded in abatement. But the present question does not depend on the general law and rules of pleading: it must be decided upon the true construction of the statutes of set-off. There is certainly no express decision of the point. But the words of the statutes of set-off, 2 Geo. 2, c. 22, § 18; 8 Geo. 2, c. 24, § 4, 5, are "mutual debts;" "upon what account the sum set off became due:" 2 Geo. 2, c. 22, § 13, and "how much is truly and justly due." 8 Geo. 2, c. 24, § 5. These words show, that what may, in the general legal sense, be perhaps comprehended under the word "debt," is not what is meant by the statutes in question, but more strictly what is absolutely and indisputably due at the time of the set-off. Now it is not to be presumed that the writ of error was brought for delusion: and if it should turn out, upon the decision in the court of error, that the judgment pleaded by the defendant was erroneous, there is, by relation, no debt due at the time of set-off. But at all events, and whatever become of the replication, this plea

is bad: for the declaration is generally of Trinity Term, and therefore, in contemplation of law, is of the first day of that term. So is the plea; for there is no imparlance, nor any special entry of the plea (like a special memorandum), at a subsequent day in the term. But the judgment pleaded is stated to have been recovered "on Friday next after eight days of the holy Trinity," that is, at a time posterior to the time of plea pleaded, which is repugnant and absurd.—(BULLER, Justice.—"Those words are under a *videlicet*, and may be rejected; and this is not a special demurrer.")—No, the words are part of the description of the judgment; and if issue had been [*184] taken on the fact of such a judgment having been recovered, *it must have been proved to have been on the day specified.

Lord MANSFIELD.—We are all clear with the defendant on the first and principal point; but Mr. *Lane* has caught you on the other point.

Shepherd.—That is only an objection of form. So, in a declaration entitled of the term generally, if the cause of action is laid to have accrued on a day in that term, that being assigned for error has been held to be mere form.

BULLER, Justice.—Mr. *Lane* is right. The day laid here is part of the description of the judgment.

Shepherd.—Then the Court will certainly give the defendant leave to amend; for the fact is, that the plea was delivered after the day on which the judgment is stated to have been given; but the plaintiff, who made up the record, has entered it generally, and it would be highly unjust to permit him to avail himself of a defect which he himself has occasioned.

BULLER, Justice, said that a similar blunder had happened in the very first case he had ever argued, and that on motion leave was given to amend, the costs of the amendment to be paid by the plaintiff. The like leave was given in this case; and *Lane* said, that if, upon inquiry, he should find that the fact was as *Shepherd* had stated, he would agree, on the part of the plaintiff, to consider the plea as if amended.

On Monday, the 23d of November, *Lane* being satisfied of the fact, the plea was considered as amended; but he then said he thought it as liable to objection as before, and therefore desired leave to argue the case again as it now stood.

The Court ordered it to be restored to the paper, and to be argued the day following.

This day *Lane* stated his objection to the plea, as it now stood, to be, that the judgment attempted to be set off was posterior to the commencement of the action. Such a debt, he said, according to the words of the statutes and the practice since the passing of those acts, cannot be set off against a plaintiff's demand. The words of 2 Geo. 2, c. 22, § 13, "where there are mutual debts," and "if either party sue or be sued as executor, or administrator, where there are mutual debts between the testator, or intestate, and either party"—these words clearly suppose the debt to be set off to have subsisted at the time of the commencement of the action. Accordingly it has been [*185] the constant practice, *in pleading a set-off, to allege, "that the plaintiff, at the time of exhibiting his bill (or suing out the original), was and still is indebted to the defendant." Besides, what is the import of the words "mutual debts?" What else can they mean but co-existing demands, for which there are co-existing remedies? Such being the words of the statutes, and such the practice in pleading since they passed, some authority, some positive decision, is to be expected from the other side to support the present plea. It will scarcely be argued that the cause of action on which the judgment pleaded by the defendant was obtained *may* have existed before the commencement of the plaintiff's action. If that were admitted, it could

not be of any service to the defendant. For *that* cause of action was a contract, and was entirely extinguished as soon as the judgment took place. This was expressly decided in the case of *Bidleson v. Whytel*, B. R. T., 4 Geo. 3, 3 Burr. 1545-1548, where the original action being upon a contract, and the second on the judgment obtained in that action, the Court held, "that the contract was extinguished by the judgment." If we consider the words of the clause of 5 Geo. 2, cap. 30, for setting off mutual debts in cases of bankruptcy, they will be found to confirm the present argument. The words are, "where it shall appear that there *have* been *mutual* debts between the bankrupt and any other person, at any time before such person became bankrupt," § 28. These words are clearly confined to co-existing debts at the time of the bankruptcy, and so they have been always understood—*Ridout v. Brough*, B. R. T., 14 Geo. 3, Cowp. 133: and this clause being in *pari materia* with those of 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, they ought to be taken together, and to receive a similar construction. The present case may be compared to those where a release having been obtained from the plaintiff after the commencement of the action, the defendant has been permitted to plead it in bar. But there is this essential difference: A release is the act of the plaintiff himself; it is a voluntary discharge of the demand; and therefore it would be unreasonable to proceed afterwards to enforce what he had relinquished under his own hand and seal. But a judgment against a party is involuntary on his part; "*Judicium redditur in invitum*." *The most analogous case is that of a tender. [*186] Now it is established law, that a tender made after the commencement of the action cannot be pleaded in bar. The case of *Brown v. Beakerville*, B. R. T., 1 Geo. 3, 2 Burr. 1229; 1 Blackst. 293, S. C, is very strong in support of the present objection to the defendant's plea. Lord MANSFIELD there says, "If, *at the time of the action brought*, there are mutual demands, they may be set off by the statute," 1 Blackst. 293; and those words are printed in italics in Mr. Justice BLACKSTONE's reports, manifestly because they were spoken emphatically, to draw the line beyond which the plea introduced by the statute does not extend. It is true that in that case the verdict on the defendant's demand was obtained after the commencement of the plaintiff's action; but there is a most material distinction between a verdict and a judgment; for, as Lord MANSFIELD then declared, "A verdict does not annihilate or extinguish the debt, nor change the nature of it," Blackst. *ibid.* 294. The Court must decide this point on the construction of the statute or statutes (for, as to this question, there is no difference between them), and will not be governed in their decisions by authorities where other matters arising after the action brought have been permitted to be pleaded in bar; as in the case of *Sullivan v. Montague*, *supra*, vol. i. p. 106, which may be cited on the other side.

Shepherd.—If by statute a new plea in bar is introduced, I take it to be clear, that such new plea must be governed by the rules of pleading previously known and established, unless the case is made an exception to those rules by the statute itself. It is therefore sufficient for me to show that the plea in the present case is within the general rules; unless, on the other side, it has been or can be shown that there is an exception as to pleas of set-off. Now the general rule was very clearly laid down, and confirmed, by this Court, in the case of *Sullivan v. Montague*. The words of Lord MANSFIELD were "*Action on goes* (and his lordship adds, "*in every case*") to the time of pleading, not to the commencement of the action," *supra*, vol. i. p. 112. It is argued that the words of the statutes of set-off make that new plea an exception. *But I can find no such meaning in those words. There is nothing said, in either statute, about the co-existence of the debt [*187]

—nothing to confine the plea to such debts as existed when the action was commenced. As to the statute of 5 Geo. 2, c. 30, it seems to furnish a strong argument in favor of the defendant; for if it be true (which I do not controvert) that by that statute no debts but what existed previous to the bankruptcy can be set off before the commissioners, it seems to follow, when we consider that all the three acts passed within a few years of one another, that the legislature did not mean to establish the same restriction with regard to pleas or notices of set-off. If that had been meant, words equally strong would have been used in the one case as in the other. In the case of *Marsh v. Chambers*, B. R. T. 18 Geo. 2, 2 Str. 1234, the Court held that a demand arising upon a note of hand endorsed to the defendant after the bankruptcy could not be set off against the assignees, because the statute of 5 Geo. 2 expressly says "mutual debts at any time *before* such person became bankrupt." That case, therefore was determined on the peculiar manner in which the statute of 5 Geo. 2 is worded. As to *Brown v. Baskerville*, it certainly was there held that a judgment alters the nature of the original debt, so that an action can no longer be maintained upon it; but Lord MANSFIELD said, that the verdict was conclusive evidence of the original debt, and the verdict, in that case, was given at a time subsequent to the commencement of the suit. Is it possible seriously to contend, that if a defendant has only obtained a verdict, he may set off his demand against that of the plaintiff; but that, if he proceed to judgment upon such verdict, his condition will be worse, and that he can no longer avail himself of the benefit of the statutes of set-off? Even on an injunction bill in equity it is most certain that the Court would not inquire whether the judgment relied on by the plaintiff as the ground for an injunction was previous or subsequent to the commencement of the defendant's action. In actions against executors, a judgment obtained against them by a third person after the commencement of the action is often pleaded in bar; and the legality of such a plea has never been disputed. It is said of judgments that "*redduntur in invitum*;" but a judgment is so far the act of the party against whom it is *pronounced, [188] that it is incompetent for him to controvert it afterwards. The case of tenders is particular, and stands on its own bottom. A tender is the voluntary act of the defendant. The plaintiff cannot know whether such a step will be taken; and it would be absurd if he were to be barred of his action and lose his costs in consequence of a thing being done after the commencement of the action, which he could not foresee.

Lane, in reply.—In *Sullivan v. Montague*, the point relied on was not the *res judicata*. Besides, though the words are "in every case," it cannot be supposed that Lord MANSFIELD meant to lay down as a universal rule, a single exception. If he had, the case of tenders would be no exception; which it is admitted to be. What reason, therefore, is there why the case of set-off should not also be an exception? It has certainly happened very frequently, that bills and notes endorsed to a defendant after the commencement of the action, and offered to be set off at Guildhall, under a notice, have been rejected. The judgment set off in the present plea, which is on promises generally, may not have been for any liquidated cause of action. It may have been for a special assumpsit, a promise of marriage, &c. The plaintiff, therefore, might not have it in his power at the commencement of his action to ascertain the amount, so as to see whether it covered his own demand. Yet though, on that supposition, he had a conscientious right to his action at first, if this plea is supported, he will be subject to pay the costs on both sides. As to the case of a plea, by executors, of a judgment recovered after the commencement of the suit, such a plea in effect admits the plaintiff's cause of action, and only operates to cover the assets.

LORD MANSFIELD.—Have you any case where it has been decided that notes endorsed after the commencement of the action cannot be set off?

Lane.—I know of no such determination; but I am told by those most conversant in Nisi Prius business, that it is the constant practice not to permit such notes to be set off.

BULLER, Justice.—The case of *Lucas v. Marsh, Barnes, 453*, is rather an authority the other way; for it is there said “that where an endorsed note is set off, it must be proved that the name of the endorser was written *before the plea pleaded*,” *not, “that it must have been written *before the commencement of the action*.” [*189]

LORD MANSFIELD.—Nothing is more apt to mislead than the suggestion of a supposed general practice, unsupported by any authority or decision. This case has been extremely well argued; and the plea is certainly very judiciously pleaded, for it does not mention the commencement of the action, but states generally that the judgment was “*heretofore*” recovered, and was still in force. The case of *Sullivan v. Montague* seems to me to be decisive. Anything may be pleaded in bar which is a legal answer to the demand, and happens before plea pleaded, unless where it is (as in the case of a tender) the defendant’s own act. A note or bill endorsed after the action brought may be set off, unless when the endorsement is merely colorable and collusive between the endorser and the defendant, in order to defeat the plaintiff’s demand.

ASHURST, Justice.—The only exception to the general rule laid down in *Sullivan v. Montague* is where the matter of defence arises from the act of the defendant. In such a case it would be unjust to permit him to avail himself of his own act, which could not be foreseen, to bar the plaintiff’s action. Notes and bills endorsed are not within the reason of that exception, unless where the endorsement is collusive; in which case, where the set-off is pleaded, I should think the plaintiff might reply, that the endorsement was made fraudulently and by collusion.

BULLER, Justice.—As all pleadings are to be taken most strongly against the party pleading, and it is not stated in this plea that the promises on which the judgment was recovered were made before the commencement of the plaintiff’s action, I shall consider the case as if it were admitted that the defendant’s original cause of action did not arise till afterwards. This lays out of the case all that part of the argument for the plaintiff respecting the extinguishment of the first demand by the judgment; though it would be very hard law indeed to apply that doctrine to this case in the extent contended for, if the original debt had clearly existed previous to the commencement of the plaintiff’s action. But the only question here is, whether the rule laid down in *Sullivan v. Montague* applies to this case. It is a mistake to say that the Court did not decide the point in that case. They did decide, and upon great consideration. I remember *I looked through all the [*190] books on that occasion, and could find no exception to the rule. It is [*190] said that a release is the plaintiff’s own act. But so is a contract for goods. So is the acceptance of payment after the action brought. Indeed a set-off is analogous to payment. A bankrupt’s certificate, obtained after action brought, and before plea pleaded, is constantly pleaded in bar. When an executor pleads a judgment obtained after action brought, it is a plea in bar, and not merely to cover assets. There is no doubt the words in *Brown v. Baskerville* are as they have been cited on the part of the plaintiff. But the reason why the case of a demand accruing after action brought and before plea pleaded is not mentioned can only be that such a case, being less common, was not adverted to by the Court at that time. But in *Lucas v. Marsh* it does not seem to have been adverted to. Consequences as to costs can make no part of our consideration. They are accessory and follow the principal. Judgment for the defendant.

The KING v. The Inhabitants of ST. LAWRENCE.¹ No. 24.

The assessment to the land-tax, if it appears doubtful on the face of the rate whether it be on the landlord or tenant, is presumed to be on the tenant.

THIS was a rule to show cause why an order of sessions should not be quashed, confirming an order of removal by which Charles Scullard, his wife, and their three children were removed from the parish of Eastmeon, in the county of Southampton, to the parish of St. Lawrence in Winchester. The case stated by the sessions was as follows:—The paupers resided in Petersfield, under a certificate from St. Lawrence, for some time previous to the year 1780. Before the making of the assessment after mentioned they removed to Eastmeon, and occupied a house there till the 8th of May last, the day of making the order of removal. William Clark was the proprietor of the house. On the 7th of June, 1783, a land-tax assessment was made for Eastmeon in the following form;—

“County of Southampton to wit.—For the tything of Eastmeon an assessment, made in pursuance of an act of *Parliament, passed in the 23 [191] year of His present Majesty’s reign, for granting to His Majesty, by a land-tax to be raised in Great Britain, for the service of the year 1783.”

Rentals.	Names of Proprietors.	Names of Occupiers.	Sums assessed.
£ s. d. 1 0 8½	Mr. Wm. Clark.	Charles Scullard.	£ s. d. 0 4 0½

Scullard, after this rate, paid the assessor, who called at his house and gave him the following receipt:—

“Oct. 20, 1783.—Received of Mr. Charles Scullard 2s. and ½d. for half a year’s land-tax for Mr. Clark’s house, due at Michaelmas last. Per Jos Terrell, assessor.”

The parish of Eastmeon consists of seven tythings, of which Eastmeon is one; which seven tythings are separately assessed to the land-tax. Terrell was collector as well as assessor.

Bearcroft and Marshall, in support of the order of sessions.—This is the first question upon a settlement under the land-tax acts which has come before the Court since the statute of the 20 Geo. 3, c. 18, took effect. If we take the two requisites separately—first that of being charged with, and secondly that of paying towards the public taxes of the parish (see 3 W. and M. c. 11, § 6), the first was certainly complied with in the parish of Eastmeon, but the second as clearly was not. On the face of the rate it is perhaps equivocal whether Clark, the landlord, or the pauper, was rated. For it is clear that it is not sufficient that the tenant’s name appears on the rate, unless it was put there for the purpose of rating him.² It is a question of fact who is rated; and that, if equivocal on the rate, is decided here by the receipt. Since the 20 Geo. 3, c. 17, the form of the rate cannot be altered, because that statute prescribes a particular form. The object of the statute makes it a landlord’s tax, and not a tenant’s tax.

Burrough, *contra*.—Whether the rating is a question of law or of fact, this is a rating and payment by the tenant. The title of the rate says nothing, and there are columns both for landlords’ and tenants’ names. The

¹ S. C. ante, vol. i. p. 227, cited in notes; Cald. 379.

² See *Rex v. Carshalton*, Burr. Sett. Ca. 809, No. 252.

case of *R. v. *Mitcham*,¹ decided the land-tax to be a tenant's tax. [192] The meaning of 20 Geo. 3, was merely that the land should be rated in the name of the landlord or tenant. The expression "*Clark's house*," in the receipt, is merely a description of the premises.

LORD MANSFIELD.—The occupier is the person who, as it regards the public, ought to be rated. The remedy lies against him. The receipt here was given for the house, by way of description, as *Mr. Clark's house*. Whether the landlord or tenant be rated is a question of fact.

BULLER, J.—The rate is *prima facie* on the tenant; and if the fact be not found to be otherwise by the justices, it must be taken to be a rate on the tenant. Rule absolute.²

¹ B. R. E. 23 Geo. 3, Dougl, 226, in note.

² This case followed and confirmed that of *Rex v. Inhabitants of Mitcham*, B. R., E. 58 Geo. 3, ante, vol. i. p. 226, in *notis*; Cald. 276; 2 Nol. 129; 4 Burn. 577, 24th ed. But where the sessions stated in the case, that they were of opinion that the landlords were the persons intended to be rated in the rate, the Court of King's Bench held, that by this statement they were precluded from entering into the question; *Rex v. Inhabitants of Folkestone*, M. 30 Geo. 3, 3 T. R. 505. See also the next case, *infra*. By 35 Geo. 3, c. 101, s. 4, no person shall gain a settlement by paying taxes for any tenement not being of the yearly value of £10. That value may be partly made up of the fixtures belonging to the landlord, and demised with the house; *Rex v. Inhabitants of St. Dunstan*, M. 6 Geo. 4, 4 B. & C. 686, 7 D. & R. 178, S. C. By stat. 43 Geo. 3, c. 161, s. 59, persons assessed to, and paying the duties on houses or windows, or any of the assessed taxes, shall not thereby gain a settlement.

The KING v. The Inhabitants of LONG WITTENHAM.

Nov. 24.

[*193]

A certificated man purchased a freehold cottage in the township to which he was certificated, and died, leaving a widow and three children residing in the cottage at the time of his death, and who continued to reside there for ten weeks: held, that the widow acquired a settlement in right of her quarantine, which she communicated to her children.² A child of ten years of age removed from her mother's house on account of illness, remains part of her mother's family.³

Two Justices made an order to remove Jane Westall, widow, and her three children, from the township of Upton, in Berkshire, to the parish of

¹ This case is also reported in *Bott's Poor Laws*, Const.'s ed. (4th) 38 & 530; 2 Bott, 502, 6th ed.

² But a widow, before assignment of dower, does not gain a settlement, unless in right of her quarantine, for she has not any right, either legal or equitable, to the land; and if she enters before assignment, she is a trespasser. She has only a legal right to have dower assigned; *Rex v. Northweald Bassett*, 2 B. & C. 726, 4 D. & R. 276, S. C. It has been remarked that the situation of a widow is probably the only existing case in which a title, though complete and unopposed by any adverse right of possession, does not confer on the person in whom it is vested the right of reducing it into possession by entry; *Park on Dower*, 334. By stat. 20 Geo. 3, c. 17, s. 12, if the husband died seised, receipt of the profits of the dower without assignment is sufficient to entitle a second husband to a vote for the county. The husband of a woman, next of kin, who with the permission of the administrator resides in the leasehold tenement of the intestate, does not, by such residence, acquire a settlement. The next of kin has not even an equitable interest, but a mere right to an account; *Rex v. Berkswell*, 1 B. & C. 542, 3 D. & R. 9, S. C.

³ For the parental control continues, and the child has not contracted any relation inconsistent with it. The rule on this subject, as laid down in a late case, is, that during the minority of a child there can be no emancipation unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental control. Per *ABBOTT, C. J.*, *Rex v. Inhabitants of Wilmington*, 5 B. & A. 525, 1 D. & R. 140, S. C. So it is said by

Long Wittenham, in the same county. The order stated that Mary, one of the children, was about 12, Rachel, another, about 10, and William, the third, about 8 years of age; and that the said widow and three children were become chargeable to the said township of Upton.

[*194] *Upon an appeal to the court of quarter sessions for Berkshire, the order was confirmed, and a special case made for the opinion of this Court, which stated as follows:—John Westall and Jane his wife, being certificated from the parish of Long Wittenham to the township of Upton, went in 1764 to reside in Upton under such certificate, and, in the year 1765, John Westall purchased a cottage, with a small piece of garden ground, for the sum of £5, in that township, and continued to live upon that tenement, with his wife and family, under the certificate, till the time of his death, which happened on the 15th of February, 1784. During such his residence in the township of Upton, he had a family of the following children, viz., John, his eldest son, William, Mary, and Rachel. A short time before his death, he and all his family, except Rachel, were seized with the small-pox. Rachel being free from the infection was removed to the house of a brother-in-law, within the same township, to remain till the family should be recovered from the disease, and was then to return home to her father's family, which she never did before the removal under the order of the two justices to the parish of Long Wittenham. The father and the family became *actually chargeable* to the township of Upton a little before his death, and the family continued so till the removal. The father died of the small-pox intestate, being seised in fee, at the time of his death, of the cottage and garden, leaving Jane his widow, John his eldest son and heir-at-law, of the age of 19, and William, Mary, and Rachel, of the respective ages stated in the order of removal. Jane the widow, William, and Mary were ill of the small-pox at the time of the father's death. The widow and *all* the children except Rachel were residing upon the father's tenement at the time of his death, and continued to reside thereon for the space of ten weeks after his death, at the end of which time they were, by [*195] the order *of the two justices, removed to the parish of Long Wittenham.

Miles and *Abbott*, in support of the orders, argued as follows:—

1. The general question is, whether the widow, by her residence on her husband's tenement under the right of quarantine, gained a settlement in the township of Upton, notwithstanding the certificate, for herself and the three children, who are the subjects of the order of removal. The words of *Magna Charta* are these: *Vidua, post mortem mariti sui, maneat in capitali messuagio mariti sui per quadraginta dies post obitum mariti sui, infra quos dies assignetur ei dos sua, nisi prius fuerit ei assignata, vel nisi, domus illa sit castrum; et, si de castro recesserit, domus ei competens statim provideatur, in qua possit honestè morari, quousque dos sua ei assignetur secundum quod prædictum est.* c. 9. In the first place, it is to be observed, that this right of quarantine does not comprehend any right of property. It amounts merely to a permission to reside till the assignment of dower. In the next place, the day on which the husband died is reckoned one of the 40; so that,

BAYLEY, J., that in order to constitute emancipation, the party ought to be wholly and permanently free from the parental control; *Rex v. Inhabitants of Rotherfield Greys*, 1 B. & C. 345, 2 D. & R. 628 S. C. And in *Rex v. Inhabitants of Hardwicke*, 5 B. & A. 176, it is said by ABBOTT, C. J., that during the minority of a child he will remain, almost under any circumstances, unemancipated. See also *Rex v. Lychett Matraverse*, 7 B. & C. 226; *Rex v. Lawford*, 8 B. & C. 271. Absence by reason of sickness is not even a dissolution of a contract of hiring and service; *Rex v. Christchurch*, Burr. S. C. 494, 2 Bott, 310, 4 Burn, 413; *Rex v. Maddington*, Burr. S. C. 675, 2 Bott, 312, 4 Burn. 414.

exclusive of that day, the time of the widow's permission to reside amounts only to 39. This is expressly laid down by Lord COKE in his commentary on Magna Charta, 2 Inst. 17. In the construction of a statute, the object for which it was enacted should be considered; and if it is meant to be applied to the construction of any other statute, it should be seen how far they are in *pari materia*, or what relation they bear to one another. The statute to the construction which, on the present occasion, the above-mentioned chapter of Magna Charta must be applied, is that of Car. 2, which says, "That it shall be lawful, on complaint, &c., within 40 days after, &c., for any two justices, &c., by their warrant, to remove and convey such person or persons to such parish where he or they were last legally settled, either as a native, householder, or, &c., for the space of 40 days at the least," 13 & 14 Car. 2, c. 12. The words of this last statute are strict, and so the decisions of this Court have always been, in requiring a residence of 40 days. Will they then, in the case of quarantine, where the widow cannot be said, with exact propriety *to reside on her own, having, as has [*196] been already observed, no property in the tenement, include the fraction of that day on which the husband died, and reckon it as a whole day, in order to make up the necessary number? It was solemnly determined here, in the case of *Pugh v. the Duke of Leeds*, M. 18 Geo. 3, Cowp. 714; *supra*, vol. i. p. 53, that the words "from the day of the date" may either include or exclude the fragment of that day, according to the subject-matter and the intention of parties, Comp. 717. Thus in actions against the *hundred*, on the statute of Hue and Cry, 27 El., c. 13, where the words are, "That no person shall take any benefit, &c., except he or they so robbed shall commence his or their suit or action within one year next after such robbery," § 9, the construction has been, that the fraction of the day of the robbery shall be reckoned as a day in computing the year, *Norris v. The Hundred of Gautrais*, 1 Brownl. 156; *Hob. 139*; 2 Rolle's Abr. 520, pl. 8, cited vol. i. p. 448. Vide also *Rex v. Adderley*, M. 21 Geo. 3, *supra*, 463. This was in favor of defendants in a penal action. Upon the same principle, in the case of homicide, in order to make it murder, in the computation of the year and day, within which it is requisite that the party should die, the day upon which the hurt was done is included, 1 Hawk. Pl. Cr. 79; 4 Blackst. Comm. 197. On the other hand, in the case of protections, the day on which the writ was *tested* was excluded; for if a writ of protection issued, bearing date the 7th of January, *pro uno anno*, the re-summons, &c., could not be sued out till the 8th of January of the ensuing year, Co. Litt. 130, b. So in the case of an insurance upon a life, for one year, from the day of the date, which was the 3d of September, the party whose life was insured having died at one o'clock in the morning on the 3d of September in the next year, the underwriter was held to be liable,¹ the day of the date

¹ *Sir Robert Howard's Case* at Guildhall, 11 Will. 3, 2 Salk. 625; Holt, 195; 12 Mod. 256.

Upon the Statute of Enrolments, which enacts "that the enrolment shall be made within six months after the date of the deed," the day of the date was held to be exclusive; *Thomas v. Popham*, Dyer, 218, b.; *Moor*, 40, S. C. So where there was a proviso in a patent that a specification should be enrolled within one calendar month after the date, Lord ELLENBOROUGH ruled that the day of the date was exclusive; *Watson v. Pears*, 2 Camp. 294. So in the computation of bills of exchange, the day of the date or sight is excluded; *Bellasis v. Hester*, 1 Ld. Raym. 280; *Coleman v. Sayer*, 1 Barnard, 808; *Chitty on Bills*, 278, 6th ed. But where the computation is to be from an act done, the day on which the act is done is to be included; *Bellasis v. Hester*, 1 Ld. Raym. 281. Thus where a month's notice of action is given, the month begins with the day on which the notice is served; *Castle v. Burditt*, 3 T. R. 628; see *ante*, vol. ii., p. 463 (n); and see *Lester v. Garland*, 15 Ves. 254.

*being excluded. In the case of quarantine, the fraction of the day [*197] on which the husband died ought not to be included, so as to burden the parish with the settlement of the widow, because, from the words of the statute of Car. 2, it seems clearly to have been the intention of the legislature, that full 40 days should be exhausted in order to burden the parish and discharge a former settlement.—[BULLER, Justice.—Was it not held in the case of *Rex v. Painswick*, that a widow by residence under her right of quarantine gains a settlement? T. 14 Geo. 3, Burr. Settl. Ca. No. 243, recognised in *Rex v. Northweald Bassett*, 2 B. & C. 728, 4 D. & R. 276, S. C.] There were particular circumstances in that case: the widow occupied the tenement in the persuasion it was her own, and that the son of her first husband was dead. Besides the point decided in that case was, that a dowress cannot, as such, communicate a settlement to a second husband and her children by him.

2. Supposing in a common case, and under the authority of *Rex v. Painswick*, the Court should hold, that a widow would gain a settlement by the legal residence under her right of quarantine, yet that authority will not extend to such a case as this, where the widow and her husband came into the parish under a certificate. It has never been decided, or said, that a mere right of residence, without any property in the premises, will discharge a certificate. See what the consequences would be if the certificate were held to have been discharged in this case. The husband could not have gained a settlement; for he was purchaser under £30. Yet, although he was liable to pay taxes and contribute to parochial expenses, and she was not, she shall by a mere right of residence for thirty-nine or forty days, without property, gain a settlement for herself and her children, which the husband could not have done, who had the property, and was irremovable during all the time he [*198] chose to reside on the tenement. *It has been said by the Court, that one of the reasons why a man gains a settlement by residing on his own property, though under the value of £10 a year (unless within the restriction of 9 Geo. 1, c. 7), is because the property of almost any tenement makes him more responsible and gives the parish a better hold of him than the mere renting of £10 a year. But that reason does not apply to the residence under a right of quarantine.

3. Lastly, If the widow should be held to have gained a settlement for herself, yet, under the circumstances of this case, she could not communicate a settlement to any of the three children. They were all above the age of seven, the settled line of emancipation;¹ and on their father's death, their continuance in the tenement must be considered as a residence, not with their mother, but with their older brother, to whom it descended as heir-at-law. If they had not labored under the small-pox, the parish might have removed them on their father's death. In all the cases of derivative settlements from the mother, it must appear that the child made part of the mother's family. That was the case in *Paulspury v. Woodend*, B. R. H., 13 Geo. 1, 2 Ld. Raym. 1473; 2 Str. 746, and *Rex v. Barton Turfe*, T. 8 & 9 Geo. 2, Burr. Settle. Ca. No. 15, p. 49. Here no such thing is stated, and it has been said the contrary is the natural presumption. The daughter Rachel in particular could not acquire a derivative settlement from the mother.

Beacroft and *Simeon* argued on the other side. They said,

1. That this case rested on a principle to which there is no exception unless by express statute, namely, that whoever resides forty days, irremovable, in a parish, gains a settlement in that parish. The exception by statute is, when a man becomes irremovable by his own act, viz. by a purchase under

¹ The age of seven is merely the termination of the age of nurture, and not the line of emancipation; see the cases ante, pp. 198, 194.

£30, 9 Geo. 1, c. 7. Here the widow became entitled to reside by the act of the law, and by her own. It is very true that this case of quarantine goes a step farther than those where the residence is on the pauper's own property, but it is governed by the same principle.

2. As to the children, in all cases where the mother gains *a new settlement after the father's death (unless when it is by another [*199] marriage), the derivative settlement of the children from the father is discharged, and the new settlement is communicated to them through the mother, if they continue of her family, whatever their age may be. Here there is no pretext to say that the younger children ceased to make part of the mother's family.

3. Then as to Rachel, she only left the family to avoid the infection of the small-pox. This was in consequence of the act of God, and not voluntary, and she never was emancipated. It is expressly found that she was to return when the family should have recovered from the disease.

Lord MANSFIELD and BULLER, Justice, were clear that the mother and all the three children were settled at Upton.

WILLES and ASHURST, Justices, absent.

BULLER, Justice, said, that with regard to Rachel there was a much stronger case lately decided upon a derivative settlement gained by a son, notwithstanding frequent and long absences from his father's family.¹

Both the orders quashed.

¹ That was the case of *Rex v. Tottington Lower End*, E. 23 Geo. 3. The pauper's father, when the pauper was born, was settled in the township of Tottington Lower End. When the pauper was seven years old, his mother died, and he and his father went to live with his uncle in the township of Pilkington. The father boarded, but the uncle out of charity took the pauper, and provided him in clothes, board, and lodging. About eighteen months afterwards, the father went to reside in the adjoining township of Ratcliffe, the pauper continuing with his uncle till he was ten years of age, when quarrelling with his uncle's wife in the absence of the uncle, he went to his father's house, and stayed there about a fortnight; but the father not having a loom to accommodate him as a weaver (the business he was to be bred to), he returned, by his father's desire, to his uncle, who taught him the business, sent him to school in the evenings, found him in clothes and board, and received the money he earned. In this way he remained till the age of sixteen, only going to see his father now and then, at holiday times. Sometimes he would stay all night at his father's. When the pauper was fourteen, the father came to the township of Pilkington, and gained a settlement there by renting a tenement of £10 a year. The pauper considered his father's house as his home, and that he could have gone to him when he pleased, and his father would have received him. The father thought himself obliged to provide for him if the uncle had turned him away. When he was sixteen, having quarrelled with the uncle, he told him he would *leave him and return to his father, which the uncle said he might do, and which he accordingly did; and having told the circumstances of the quarrel, he was received by him as part of his family, and continued some time assisting his father in his hay harvest. Afterwards the father desired him to return, and see if the uncle would take him again, which he did, and then agreed with the uncle to pay for his board, and work for himself. It did not appear that he ever afterwards returned to his father. After his last return to the uncle, the father paid the uncle 2s. 6d. which the pauper had taken from him; and the father declared that if the uncle had gone to live at a greater distance from him, he would not have suffered the pauper to go with him. The pauper had done nothing to gain a settlement in his own right. The Court of Quarter Sessions (for the county of Lancaster) were of opinion that the pauper's settlement was at Tottington Lower End. [*200]

Fearnley, in support of the order of sessions, cited *Eastwoodhey v. Westwoodhey*, T. 7 Geo. 1, 1 Str. 438, *St. Michael Coslany*, Norwich, v. *St. Matthew's*, Ipswich, E. 2 Geo. 2, 2 Str. 831; *Rex v. Bugden*, H. 21 Geo. 2, Burr. Settle. Ca. No. 93. p. 270: 1 Wils. 183, and *Rex v. Walpole St. Peter's*, E. 9 Geo. 3, Burr. Settle. Ca. No. 197, p. 638.

Cockell, on the other side, relied on *Rex v. Halifax*, E. 16 Geo. 3, Burr. Settle. Ca. No. 251, p. 806, as nearly in point.

Lord MANSFIELD.—The pauper looked upon himself all along as part of his father's family, and the father also thought so. The uncle was not bound to keep him; and

when he quarrelled with the uncle or his wife, he went to his father's as his home, and was received. It seems to me that there is no ground to say that he was emancipated.

The order of sessions quashed.¹

¹ The case of *Rex v. Tottington Lower End* is also reported in *Cald.* 284; 1 *Nol. P.* L. 279, 8d ed.; 4 *Burn*, 297, 24th ed.

The KING v. The Inhabitants of ST. JAMES.¹ Nov. 24.

Where the receipt of the collector of the land-tax expresses the sum paid to be so much assessed upon the landlord; it must be presumed that the landlord was rated (if not that the payment also was by him), and therefore that the tenant gained no settlement.

SAMUEL CROSS PURKIS and Sarah his wife were, by an order of two justices, removed from the parish of St. James, in Bury St. Edmund's, to the parish of Hopton. The parish of Hopton appealed, and the Court of Quarter Sessions quashed the order upon the following case.

[*201] *Samuel Cross Purkiss, being legally settled at Hopton, became an inhabitant and occupier of a tenement in the parish of St. James, in the town of Bury, belonging to Joshua Grigby, Esq., at the yearly rent of five pounds, and during his residence there paid the land-tax when demanded of him by the officer. The title and form of the rate were as follows:

"Borough of Bury St. Edmund's, in the county of Suffolk, for the parish of St. James, in the said borough.—An assessment made in pursuance of an act of parliament passed in the 23d year of his majesty's reign, for granting an aid to his majesty by a land-tax to be raised in Great Britain for the service of the year 1783, and made in the following manner:—

Names of Proprietors.	Names of Occupiers.	What assessed and where situated.	Sums.	Assessed.
Josh. Grigby, Esq.	Samuel Purkis.	East Gate Street Tenement.	£. s. d. 4 0 0	£. s. d. 0 4 0

All the other assessments are made in like manner. The collectors, who are parishioners, demanded the said tax so assessed of the pauper, who paid the same, and they gave him a receipt for it in the usual printed form, in the words following, viz.—"The 25th day of December, 1783, received of Mr. Samuel Purkis the sum of four shillings; so much being assessed on the landlord for the third quarterly payment, pursuant to an act of parliament for granting an aid to his majesty by a land-tax to be raised in Great Britain for the service of the year 1783. By John Lawrence, Collector. £0 4s. 0d."

Upon this evidence the Sessions adjudged that the pauper by the above rating and payment had acquired a settlement in St. James's.

Mingay showed cause against the rule for quashing the order of sessions. By determining the settlement to be in St. James's, Bury, the Sessions have drawn their conclusion that the tenant is rated, and not the landlord. It is determined that the land-tax is a tenant's tax, and not a landlord's tax; and therefore at the time the rate was made the tenant was the person rated. This could not be affected by what happened afterwards between the collector [*202] and the pauper. *The rate is the language of the assessor: the receipt is only the language of the collector. In fact, the receipt ought not to have been made use of at all.

¹ S. C. ante, vol. i. p. 227, *in notis*. See the last case.

Adair and Le Blanc, contra.—The rate is made doubtful on the face of it; uncertain which is meant to be assessed, whether the landlord or the tenant; therefore it is to be explained by extrinsic circumstances. The receipt explains the doubt, and shows that it was the landlord who was meant to be assessed. In fact, here is not a rating or payment by the tenant. If the tenant is assessed, he certainly did not pay, for the receipt expresses that the landlord paid. A pauper cannot gain a settlement unless he pays as well as is assessed.

LORD MANSFIELD.—The landlord or tenant may either of them be assessed. If, on the face of the rate, it does not appear which is assessed, *prima facie* it is the tenant; for it is a tenant's rate. But this *prima facie* evidence may be rebutted; and here is a strong piece of evidence, coming out of the tenant's hands, which proves that the landlord was the person rated.

BULLER, J.—The receipt is strong evidence (as put by Mr. *Adair*) against both the rating and paying by the tenant. Rule absolute.

SIDGIER v. ALDUS. Nov. 25.

Oyer cannot be demanded of an indenture mentioned in the condition of a bond, but the Court will order a copy of the indenture to be given to the defendant.

THIS was an action of debt upon a bond. On Saturday, the 20th of November, *Mingay* obtained a rule to show cause why the plaintiff should not be ordered to give the defendant *oyer*, and a copy of a certain indenture of assignment mentioned in the condition of the bond on which the action was brought, and why thereupon the defendant should not be at liberty to plead *de novo*, and for the stay of proceedings in the mean time.

This rule was founded on an affidavit of the defendant, that the condition of the bond was to perform the covenants in a deed of assignment of his fees and income as one of the cursitors of the Court of Chancery; that this deed was in the custody of the plaintiff, his attorney, or agent; and that *the defendant found it absolutely necessary to have a copy of it before he could plead: that being pressed for a plea, he had pleaded [203] a judgment recovered, in order to prevent judgment being entered up against him, and had demanded *oyer* and a copy of the plaintiff, who had not complied with such demand: that he was advised that he had a good defence.

Law now showed cause against the rule, and produced an affidavit of the plaintiff's attorney, stating that the defendant had craved and had *oyer* and a copy of the bond and condition; that, at the same time, a plea had been demanded; that the defendant having pleaded a judgment recovered, a rule was served upon him to abide by his plea, or to plead such other plea as should not be waived; that no demand of *oyer* and a copy of the deed of assignment was made till after the defendant had pleaded, and the rule to plead was expired, and the paper-book was made up and delivered to the defendant.

Law then stated that *oyer* cannot be had of an instrument of which no *profert* is made: and that if *profert* ought to have been made, and had not been made, that would have been a ground of demurrer: that a mere reference on the record to an instrument does not entitle a party to *oyer* of that instrument.

To this the Court assented, but held, that the defendant ought to have a copy of the deed, and seemed to think the sham plea was justifiable, for the purpose of gaining time to procure such copy.

The rule, therefore, was made absolute, that the plaintiff, or his attorney, should forthwith deliver to the defendant a copy of the deed of assignment, he paying a reasonable price for the same; that the defendant thereupon should have leave to plead *de novo instantier*; and that the cause should be tried at the sittings after the term; and if the plaintiff should recover, he should be at liberty to tax his costs, sign judgment, and take out execution as of the present term.¹

¹ So in a case cited by Mr. Tidd, Pr. 685, 8th ed., H. 21 Geo. 3, K. B., it was held, that in an action on a bond in which articles are referred to, oyer of the bond may be demanded, but not of the articles, though time to plead may be obtained till the plaintiff give a copy of them, on an affidavit that defendant has no copy.

The practice with regard to granting inspection and copies of documents in the hands of the other party does not seem well settled. In *Jevens v. Harridge*, *M. [204] 18 Car. 2, 1 Saund. 9, it is said that the Court will sometimes compel the plaintiff to give a copy of an indenture to the defendant, if he swears that he never had one part, or that he has lost it; but this is from the favor of the Court, and not of right. So where plaintiffs applied to read and take a copy of an indenture in the hands of the defendants, containing covenants on which they intended to proceed, one part of the indenture only having been executed, the Court granted the application. *Blakey v. Porter*, M. 49 Geo. 3, C. B., 1 Taunt. 886. So in *Bateman v. Phillips*, M. 52 Geo. 3, C. B., 4 Taunt. 157, the Court ordered the defendant to produce an instrument in his possession, in order that the plaintiff might get it stamped, though the latter was no party to the instrument. A similar rule was granted in *King v. King*, M. 58 Geo. 3, C. B., 4 Taunt. 667, where only one part of an indenture had been executed by plaintiff and defendant, which was in custody of the defendant. In a later case a similar rule was granted, though the defendant, in whose possession the indenture remained, had never executed it; *Morrow v. Saunders*, T. 59 G. 3. C. B., 1 B. & B. 318; 3 Moore, 671, S. C.; and in an action against a sworn broker of London for negligence in making a contract, the Court compelled him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract; *Browning v. Aylwin*, T. 8 Geo. 4, K. B., 7 B. & C. 204.

In other cases the Court has refused the application, unless it appears that the party in possession of the deed, &c., holds it in some manner as a trustee for the other. Thus where two parts of a charter-party were executed, and one part was lost at sea, the Court refused to make the party in possession of the other produce it. *Street v. Brown*, T. 55 Geo. 3, C. B., 6 Taunt. 802. So in an action for breach of an agreement to enter into partnership, where the plaintiff applied to inspect the partnership deed which he had refused to execute, and which was in the possession of the defendant, the Court refused the application, observing that the principle established by all the cases is, that a party can only be compelled to produce a deed where he holds it as a trustee for another. *Ratcliffe v. Bleasby*, T. 6 Geo. 4, C. B., 3 Bing. 148. So where the plaintiff had no copy or counterpart of the lease on which he was suing the defendant, and the attorney who drew the lease and counterpart had absconded, the Court refused to compel the defendant to produce the lease in his possession. *Lord Portmore v. Gorinn*, E. 8 Geo. 4, C. B., 4 Bingh. 152. So the Court will refuse an application by the defendant to be allowed to inspect the plaintiff's title-deeds. *Pickering v. Noyes*, H. 8 & 4 Geo. 4, K. B., 1 B. & C. 262; 2 D. & B. 386, S. C.: see *Brown v. Rose*, T. 55 Geo. 3, C. B., 6 Taunt. 288; *Rex v. Sheriff of Chester*, T. 49 Geo. 3, K. B., 1 Chitty, 476.

[205]

*SMITH v. COTTEREL. Nov. 26.

The Court will not order an attorney to deliver up deeds which he swears were delivered to him for a special purpose, which he has fulfilled.

On Thursday, the 11th of November, upon the motion of *Erakine*, a rule was granted against *Cotterell*, an attorney-at-law, to show cause why he should not restore to *Smith* the title-deeds of a messuage in mortgage to him.

Smith swore that the deeds were left by him with Cotterell for his advice and opinion.

Baldwin now showed cause on an affidavit of Cotterell's contradicting Smith's, and stating that the deeds had been delivered to him, not for his opinion, but to be given to another person (the heir-at-law of the estate), and that he had given them to that person accordingly, and insisted that the Court could not interpose, as there was a cause depending to which the deeds related, neither had they been delivered in any cause.

Lord MANSFIELD.—That is not a sufficient reason why the rule should not be made absolute. It would be often very proper for the Court to compel attorneys or counsel to restore papers which have been delivered to them for their opinion, or in the way of business, though not in any cause. But in the present instance, on the particular circumstances disclosed in the affidavits, the rule cannot be supported. The rule discharged.

¹ Where the deeds had been deposited with an attorney who had engaged to deliver them up, the Court of King's Bench compelled him to do so. *Strong v. Howe*, H. 11 Geo. 1, K. B., 1 Str. 621; *Hughes v. Mayre*, E. 29 Geo. 3, 8 T. R. 275, S. P. And where an attorney had been employed by an administrator to collect effects, &c., the Court compelled him to render an account, and to deliver up the papers, though he had not been employed to conduct any suit, &c. In the matter of Aitkin, M. 1 Geo. 4, K. B., 1 B. & A. 47; *De Wolfe v. —*, 2 Chitty, 68, S. P.; In the matter of Knight, M. 3 G. 4, C. B., 1 Bingh. 91; *Langslow v. Cox*, 1 Chitty, 98.

But where the documents have not been placed in the hands of the party in his character of attorney, the Court will not order him to deliver them up, but will leave the party to his remedy in equity. *Cocks v. Harman*, E. 45 G. 3, K. B., 6 East, 404. And even where a lease had been put into *the hands of an at-[*206] torney, in order to prepare an assignment, there being no cause depending, the Court refused to order him to deliver them. In the matter of Lowe, H. 47 Geo. 3, K. B., 8 East, 288; but see 4 B. & A. 49.

And where an attorney holds a deed as trustee, the Court will not order him to deliver it up. *Pearson v. Sutton*, H. 54 Geo. 3, C. B., 5 Taunt. 364.

Where something is to be done for which a *mandamus* would lie, as delivering up court rolls, &c., the Court will interfere in a summary manner, and direct it to be done. *Hughes v. Mayre*, E. 29 Geo. 3, 8 T. R. 275; *Ex parte Grubb*, M. 54 Geo. 3, 5 Taunt. 206; *Ex parte Corpus Christi Coll.*, E. 55 Geo. 3, 6 Taunt. 105; and see *Luxmore v. Lethbridge*, T. 3 G. 4, 5 B. & A. 898.

When bills of exchange have been delivered to an attorney to get discounted, the Court will compel him either to deliver up the bills, or to pay over the proceeds, though he has not been employed in any suit. *Ex parte Hall*, C. B., M. 3 Geo. 4, 7 B. Moore, 437.

COLLINSON v. GILL. Nov. 29.

In an action for work and labor, the Court will compel the plaintiff's attorney to give a note in writing of the plaintiff's trade and residence, and also to give a view of the plaintiff.

On Friday, the 26th of November, *Baldwin* obtained a rule to show cause why the plaintiff's attorney should not give a note in writing to the defendant's attorney, acquainting him who the plaintiff was, of what profession, trade, or business, and where he dwelt; and why the defendant, his attorney or agent, should not have leave to have a view of the plaintiff in London on giving notice for that purpose.

This rule was granted on an affidavit of the defendant's attorney, stating, that the action appeared, by the declaration, to be for work and labor done at the defendant's request and on his retainer, by the plaintiff as a seaman on board the defendant's ship; that the defendant had paid a specified sum

of money into court, which, with what he had besides paid to the plaintiff's order, was all he was entitled to, being the proportion of wages due to him to the time he had quitted the defendant's ship, which he had done, and entered successively on board several others, and particularly one in Jamaica, by another name; and that the defendant's attorney asked the person who delivered the issue where the plaintiff lived, who said he did not know, but that he was in London, having seen him a day or two before.

[*207] *The rule was drawn for yesterday; and no cause being shown, it was this day made absolute.¹

¹ Similar applications were granted (except as to the view of the plaintiff) in *Taylor v. Harris*, M. 1 Geo. 4, K. B., 4 B. & A. 98; *Johnson v. Birley*, H. 2 & 3 Geo. 4, K. B., 5 B. & A. 541; 1 D. & R. 174. S. C.; *Worton v. Smith*, T. 2 Geo. 4, C. B., 6 B. Moore, 110; *Newton v. Verbeke*, H. 7 & 8 G. 4, Exch. 1 Y. & J., 257.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Hilary Term,

IN THE TWENTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

The KING v. The Inhabitants of STRETTON.¹ Jan. 29.

A boy under 21 years of age is hired out by his father for several years successively, the father receiving his wages and an allowance for his washing, and the boy returning to his father's during illness. This is no emancipation.

WILLIAM COATES, with his wife and two children, were removed from the parish of Dalbury, in Derbyshire, to the parish of Stretton, in the county of Stafford. Upon an appeal to the Court of Quarter Sessions for Derbyshire, the order of removal was confirmed, subject to the opinion of this Court upon the following state of facts.

The pauper's father came into the parish of Tutbury several years before the pauper's birth under a certificate from Stretton. About the age of 13 the pauper was hired by his father to Mrs. Hains, in the parish of Handbury, for 51 weeks, which he served; then to Hannah Eyre, of Overseal, in Leicestershire, for the same time, which he served; then to one Brown, in Tutbury, also for the same time, which he served. At the expiration of this last service of 51 weeks at Tutbury, he made some sort of agreement, without the knowledge of his father, to serve the said Brown for other 51 weeks; but the father being informed thereof applied to Brown, and said his son should not serve him unless he would consent to raise his wages. Brown thereupon consented to give him 5s. a year more, and to allow the father half a strike of wheat for the pauper's washing, and then paid [*209] the father the earnest-money; and the pauper continued in his service all the last-mentioned 51 weeks, except about a fortnight or three weeks, during which time, being ill, he went to his father's house; and when recovered, immediately returned into Brown's service. Afterwards he was hired by his father to one Mould, of Clifton, for 51 weeks, but served him only one month. The pauper was first hired to Brown at Michaelmas, 1780; and his father, at Lady-Day, 1781, took lands of the value of £10 a year and upwards, which he rented one year, and during all that time continued to reside in the parish

¹ S. C. 2 Bott, 31, 6th ed.

of Tutbury. The father received all the pauper's wages (except such part thereof as the pauper had received of his master for pocket-money), and found him clothes therewith; and during the time the pauper continued in the service of Brown his clothes were washed at his father's house. The pauper is now about 19 years of age, and never lived with his father after the time of the first hiring to Mrs. Harris save as aforesaid.

Balguy showed cause.—The question is whether the pauper was part of his father's family when the latter rented the lands of £10 a year. He was hired by his father for five years successively, and lived away from him; not being in fact, at that time, part of the family. It is clear that the son's settlement shall follow that which the father had before the emancipation. Now here the son was emancipated. At the time of the renting he was servant to Brown, and part of his family. What authority had his father over him? Supposing he had absconded, Brown must have complained; if he had broken his leg by the negligence of another, Brown must have brought the action. *Rex v. Walpole St. Peter's*, E. 9 Geo. 3, 1 W. Bl. 669; *Burr. S. C. 638*, is in point. [WILLES, J.—In that case the pauper was of age before he left the army.] Here the son was absent about four years. *Rex v. Halifax*, H. 15 Geo. 3, *Burr. S. C. 806*, will be relied on by the other side; but that case is very distinguishable. The boy in that case came to his father whenever he pleased, and had no other home. In a MS. note of [*210] that case, ASTON, J., says, that in all the cases *of emancipation the son was either married or had a home elsewhere.

Lord MANSFIELD.—You have omitted that the father let him out and received his wages, and also washed for him.

BULLER, Justice.—All the cases say *emancipated*, which means set at liberty. This father exercised his authority in every instance.

Per tot. Cur., without hearing the other side.

Orders quashed.¹

¹ So in *Rex v. Collingbourne Duels*, H. 31 Geo. 3, 4 T. R. 199, it was held that a son leaving his father's family at nineteen, and serving a year under a hiring for a year, but gaining no settlement thereby, and returning again under twenty-one, was not emancipated; and see the cases cited *R. v. Long Wittenham*, *supra*.

AYSHEFORD v. CHARLOTT. Jan. 27.

It is no ground for staying the trial of an action on a promissory note given for the amount of a penalty levied under the revenue laws, that the party on whose evidence the conviction proceeded has been indicted for perjury, and a true bill found.

THIS was an action on a promissory note, and *Russell* moved to stay the trial on the ground that the note was given by the defendant for the penalty of £25, in which the defendant had been convicted under the revenue laws upon the evidence of the plaintiff, that the plaintiff had since been indicted for perjury, and that a true bill had been found on the evidence of two persons who were present at the time at which the plaintiff swore the offence was committed. The object of the motion was to put off the trial of the action till the indictment should be tried, in order to use the conviction to impeach the consideration of the note.

Per Cur. The conviction in the penalty was the consideration of the note, and that will subsist even if the plaintiff should be convicted of perjury, and can never be got rid of. Besides it would be dangerous to suffer the merits

of a civil suit to be tried in an indictment, where the party may be a witness. Rule refused.¹

¹ So the Court of King's Bench refused to stay execution after verdict and judgment until the trial of an indictment for perjury against two of the plaintiff's witnesses. *Warwick v. Bruce*, B. R., E. 55 Geo. 3, 4 M. & S. 140: see also *Rex v. Heyden*, E. 8 Geo. 3, 1 W. Bl. 404. Nor will the Court grant a new [*211] trial on the ground that a true bill for perjury has been found against some of the witnesses on the trial. *Benfield v. Petrie*, ante, vol. iii. p. 24; *Petrie v. Milles*, id. p. 27.

The KING v. The Inhabitants of ELSLACK.¹ Jan. 20.

A hiring at weekly wages for so long time as the master wants a servant is not a hiring for a year, and gains no settlement.

Two justices removed Hannah Driver from the township of Wadsworth, in the West Riding of Yorkshire, to the township of Elslack, in the same Riding, and, upon an appeal, the order of removal was confirmed by the Court of Quarter Sessions, upon the following case.

The pauper was hired to John Smith and Isaac Smith, of Wadsworth, two brothers, who lived and kept house together. She was the only female servant in the house, and did all the menial and household business. No mention was made about being hired for a year. She hired herself to them (at the wages of one shilling and fourpence by the week, and board and lodging) for as long a time as they should want a servant. When she had served seven weeks she was paid her wages, and, afterwards, when she had served two or three months; and she was paid again when she wanted the wages, and continued to live a year and five months in the same service, and declared she did not think herself loose every week nor every month.

Bearcroft, in support of the orders. I admit that a general hiring standing alone is sufficient, but under the circumstances stated, this is clearly a contract from week to week, and neither of the parties is bound for a year. Weekly wages will not prevent a settlement on a general hiring for a year, but here there is no circumstance of time but the weekly wages.

Lee and Cockell, contra. A hiring for so long time as the master shall want a servant is of itself a general hiring. But here the pauper was to have one shilling and fourpence *per week*: that is the only circumstance. [*BULLER, J.*—I wish to hear it argued that a hiring for so long time as the *master shall want a servant is a hiring for a year.] In one case a [*212] contract expressed to be at will was said to be a general hiring. See *Rex v. Stockbridge*.² Whenever the time is not made less than a year, it is a hiring for a year, which is the only hiring known to the law. The wages being payable weekly clearly makes no difference. The pauper being a menial servant, her hiring was in its nature a hiring for a year. In *Rex v. Debham*, M. 10 Geo. 3, Burr. S. C. 653, the hiring would have been held general if it had not been for the agreement for an additional sixpence. In *Rex v. Bath Easton*, M. 16 Geo. 3, Burr. S. C. 824, the Court went further, for there was a doubt in that case whether there was any retainer at all.

Bearcroft, in reply.—My admission has been misunderstood. A general hiring at weekly wages is sufficient, but here the clause "for as long a time," &c., negatives a hiring for a year.

Lord MANSFIELD.—A general hiring, without any limitation of time, is a

¹ 2 Bott. 281, 6th ed.; Cald. 480, S. C.

² M. 14 Geo. 3, Burr. S. C. 759; but that point does not appear there.

presumed hiring for a year; but, like every other presumption, it may be explained by circumstances. Here it is clearly not a hiring for a year. It is a hiring at the will of the master, subject to an agreement for weekly wages, which would prevent a dismissal in the middle of a week.

Orders confirmed.¹

¹ So a hiring for as long time as the pauper pleases is not a hiring for a year. *Rex v. Trowbridge*, 1816, cited 8 B. & C. 462. So where the pauper was hired for meat and clothes as long as he had a mind to stop. *Rex v. Christ's Parish*, M. 5 Geo. 4, 8 B. & C. 459. So also where the sessions found that the pauper hired himself, that no wages or earnest were given, but he was to have what he could get as ostler, lodging and boarding in his master's house, and that either the master or servant might have determined the service when they pleased. *Rex v. Great Bowden*, T. 8 Geo. 4, 7 B. & C. 249.

[*213] *MACKAY, Executor of DURNO, v. MACKRETH, Administrator, with the Will annexed, of SIR JOHN SHELLEY, Bart.¹ Feb. 1.

A lease to A. B. his executors, &c., for a year, and so from year to year for so long time as it shall please the lessor and A. B. his executors, &c., does not expire on the death of A. B., but vests in his executors. A tenant from year to year may make a lease for 21 years.

THE plaintiff, in an action of covenant, declared, as executor of James Durno, against the defendant, as administrator, with the will and codicil annexed, of the late Sir John Shelley, Baronet, and who in his lifetime, and at the time of his death, was assignee of his late father, Sir John Shelley. The declaration contained two counts. The first count stated, that by a lease bearing date the 8th of November, 1748, between the Honorable Thomas Hervey and James Durno, Hervey demised to Durno (among other premises in the lease mentioned) a certain dwelling-house in Jermyn Street, together with several goods and utensils, to hold to him, his executors, administrators, and assigns, from Michaelmas then last past for 21 years, at and under certain rents and covenants therein mentioned: that Hervey thereby for himself, his executors, administrators, and assigns promised and agreed to renew the said term for 21 years more on receiving six months' notice in writing previous to the determination of the said term from the lessee, his executors, administrators, or assigns, of their desire to have such renewal, at the costs and charges of Durno: that Durno, by virtue of the said lease, entered into and became and was possessed of the premises, together with the said right of renewal: that six months before the expiration of the term, viz., on the 25th of March, 1769, he demanded such renewal: that having made such demand, by an indenture bearing date the 9th of September, 1770, between him and Sir John Shelley, the father of Sir John Shelley, to whom the defendant was administrator, Durno, for the considerations therein mentioned, demised, set, and to farm let to the said Sir John Shelley, the father, his executors, administrator, and assigns, the said dwelling-house, to hold the same, with the said goods and utensils, to him, his executors, administrators, and assigns, for 21 years from Christmas then last past, subject nevertheless, [*214] to a certain proviso in the said indenture *contained for vacating and determining the last-mentioned demise at any of the times therein mentioned; yielding and paying yearly unto Durno, his executors, administrators, and assigns £96, at the four usual quarterly days. The first count then stated a covenant by Sir John Shelley, for himself, his executors, ad-

¹ S. C. 2 Chitty's Rep. 461, cited 8 T. R. 18.

ministrators and assigns, for payment of the rent to Durno, his executors, administrators, and assigns; and another, by the same to the same, for maintaining and keeping, and, at the end or sooner determination of the said term, surrendering and yielding up the said premises in repair to Durno, his executors, administrators, or assigns: then a covenant by Durno, for himself, his executors, administrators, and assigns, that if Sir John Shelley, his executors, administrators, or assigns, should give six months' notice in writing, previous to the end of the first seven, eleven, or fourteen years, of their intention to quit, the said lease should at the end of such six months, become void and null to all intents and purposes: that Sir John Shelley, by virtue of the said demise to him, entered and became and was possessed of the premises: and that afterwards, viz., on the 1st of January, 1779, all the estate, right, title, term of years then to come and unexpired, interest, property, profit, claim, or demand whatsoever, of the said Sir John Shelley, the father, in the premises by assignment thereof legally made, came to and vested in Sir John Shelley, the son, by virtue whereof he entered into and became possessed thereof: that Durno, being entitled to such renewal, in the lifetime of Sir John Shelley, the son, to wit, on the first of February, 1779, died, having first made his will, and appointed the plaintiff his executor: that he duly proved the will, and took upon himself the burden of the execution thereof, and thereby became possessed of and entitled to the said right of renewal and all other the interest of Durno in the said premises, whereof afterwards the said Sir John Shelley, the son, had notice: that the said Sir John Shelley, the son, six months before the end of the first fourteen years of the term so demised to his father, to wit, on the 19th of June, 1783, gave unto the plaintiff, as such executor, notice in writing that he would quit the premises at Christmas next ensuing: that Sir John Shelley, the son, having given such notice, the defendant, as such administrator as aforesaid, to wit, on the 24th of December, 1783, quitted and delivered up the *pos- [215] session of the premises to the plaintiff as such executor: that the said term so demised to Sir John Shelley did thereupon cease and determine: that although no further lease of the premises so demised to Durno had as yet been granted by the said Hervey, yet the said plaintiff, as such executor, was still entitled to the said renewal; and that the said Durno, in his lifetime, from the time of the expiration of the said term of 21 years so to him demised, and the said plaintiff, as such executor, since his death, had always continued and remained tenant to Hervey, his executors, administrators, and assigns of the said premises, and under and in virtue of the said right of renewal, and of the said agreement for such further lease: that Durno, in his lifetime, and the plaintiff since his death, had severally performed and fulfilled all things in the said lease to Durno contained on the part of him, his executors and administrators, to be performed and fulfilled: yet that on the said determination of the demise to Sir John Shelley, the father, £216 of the said yearly rent of £96, for two years and a quarter of the said term demised to the father, beginning after the said assignment to the son, became and were due, and owing and payable, and still in arrear and unpaid, to the plaintiff as such executor: and that the said Sir John Shelley, the son, did not, after the premises so came to him, well and sufficiently maintain and keep, nor, on the aforesaid determination of the said term so demised to his father, surrender and yield up the same in repair to the plaintiff as such executor; but that, on the contrary, the said Sir John Shelley, the son, in his lifetime, after the premises so came to him by assignment, and, after his death, the defendant, as such administrator, to wit, on the 1st of March, 1779, and from thence to the said determination of the term, suffered the premises to be greatly out of repair, and that, upon the said determination of the term,

the defendant as such administrator, surrendered and yielded up the premises to the plaintiff as such executor so out of repair. The second count set forth, that, before the making of the indenture thereafter mentioned, viz., on the 30th of September, 1769, the said Thomas Hervey, thereinbefore mentioned, demised (amongst other premises) the messuage and premises in the said indenture therein mentioned to the said James Durno, his executors, administrators, and assigns, to hold to him and them from Michaelmas in that [*216] year for a year, and so *from year to year for so long a time as it should please the said Thomas Hervey and Durno, his executors, administrators, and assigns; by virtue of which demise Durno entered and became and was possessed; and that being so possessed, by a certain indenture, bearing date the 5th of September, 1770, between him and Sir John Shelley, the father, &c. (stating exactly the same lease, provisoes, and covenants, with those set forth in the first count, and also the same assignment to the son): that the said Sir John Shelley, the son, being so possessed, and the said last-mentioned demise to Durno being still continuing, the said Durno afterwards, viz., on the first of February, 1779, died, having first made his will, and appointed the plaintiff his executor: that he duly proved the will, and took upon himself the burden of the execution thereof, and thereby became and was, and that he still was, possessed of all the estate and interest of the said Durno in the premises at the time of his death, whereof the said Sir John Shelley, the son, afterwards, and before any of the breaches of covenant thereafter mentioned, had notice: that the said demise so made by the said Durno and his executors as last aforesaid was still continuing:—then were alleged the same notice to quit by Sir John Shelley, the son, the same surrender by the defendant, the same performance by Durno and Mackay of all things covenanted to be performed by Durno, his executors and administrators, in the lease from him to Sir John Shelley, the father, and the same breaches by the son and the defendant of the covenants for the payment of rent and for repairs, as in the first count.

The defendant demurred specially to both the counts.

As causes of demurrer to the first count he showed:—1. That it was not alleged, nor did it appear, in or by the said count, that Durno in his lifetime had such an interest or estate of and in the premises therein stated to have been demised by him to Sir John Shelley, the father, at the time of making such demise, as would or could by law, on the death of Durno, vest in the plaintiff as his executor, so as to enable him, as such executor, to maintain an action of covenant upon breaches of covenants contained in that demise. 2. That it was not alleged, nor did it appear, in or by the said count, that Durno in his lifetime had such an interest or estate of and in the said premises at the time of making the demise to Sir John Shelley, the father, as [*217] would or could *enable him by law to make such demise. 3. That it appeared, in and by the said count, that the said indenture of demise to Sir John Shelley, the father, was void in law, inasmuch as Durno thereby demised the premises for a longer term than he was possessed of or entitled to in the same. 4. That it was not alleged, nor did it appear, in or by the said count, that Durno, at the time of his death, had any estate, right, title, or interest in law of, in, or to the premises. 5. That the said count was argumentative in this, that the plaintiff had therein shown that he had duly proved the will of Durno, and taken upon himself the burden of the execution thereof, and had thereby become and was possessed of and entitled to the said right of renewal therein mentioned, and all other the interest of Durno in the premises, without positively alleging or showing that Durno was at the time of his death possessed of such an estate or interest in law in the premises as, on his death, could by law vest in the plaintiff, as his execu-

tor, for the purpose of enabling him, as such executor, to maintain any action of covenant for the breaches in that count mentioned. 6. That no material issue could be taken upon such argumentative pleading. 7. That the breach of covenant in the said first count firstly assigned was double, in that it joined and attempted to put in issue two matters, viz., what rent was due from Sir John Shelley, the son, in his lifetime, and also what was due from the defendant as administrator, in the same breach. 8. That the breach in the said first count secondly assigned was double, in that it joined and attempted to put in issue two distinct matters, viz., whether Sir John Shelley, the son, in his lifetime repaired the premises, and also whether the defendant surrendered the same to the plaintiff properly repaired. 9. That the said second breach was contradictory and absurd in this, that it stated that Sir John Shelley, the son, suffered the premises to be out of repair until the determination of the said term, whereas it appeared by that count that Sir John Shelley, the son, was dead before the said determination of the said term. 10. That the said first count was in other respects insufficient, informal and absurd, &c.

The very same causes of demurrer were repeated to the second count.

Baldwin, in support of the demurrer, made two points: 1. On the first count, that the plaintiff had shown no legal title to sue; 2. On the second count, that the title of the plaintiff had expired before the breach of covenant. [218]

The principal question is the first, whether Mackay has a title at law to maintain this action. It is not sufficient that he should have a right in equity. [Lord MANSFIELD.—Shall a tenant enjoying under a lease dispute his landlord's title?] This is not an action by the lessor himself, but by an executor, who must show himself entitled. Being an action on covenants running with the land, the plaintiff must show a legal estate in the land. But the declaration does not state even what estate Mr. Hervey had, from whom the title is derived, but merely that he demised to Durno; whereas it ought to have shown that he was seised in fee. For anything that appears he may only have had a smaller term. It does not appear that Durno, or consequently his executor, had a right to the further term; for such renewal was to be on certain conditions as to the expenses, and the declaration only states a demand of a lease, which is insufficient without showing a tender to perform the conditions. But the principal question, is whether a party who has only a right to demand a lease which has never been executed has such an interest at law as will pass to his executor. It is only an equitable claim at most.

The objection to the second count on the parol demise is, that the demise ceased on the death of either party, unless such death happened in the middle of the year, when it would cease at the expiration of the year. Now the year expired after the death of the lessor, and before the accruing of the breaches of covenant.

Wood, contra.—If either count is good it is sufficient for the plaintiff. It is therefore only necessary to argue the demurrer to the second count. There is no doubt as to the justice of the case, but the question is, whether the demise from year to year by Durno determined with the expiration of the year after his death. The demise is not to Durno alone, but to Durno, his executors, &c., for so long as he and his executors, &c., shall please. That demise does not determine with the death of Durno, but continues to the breach. Sir John Shelley, the son, gave notice to Durno's executors that he would deliver up the premises to them, and in pursuance of that notice the defendant delivered up the premises to the plaintiff. Shall the defendant now be permitted to say that Durno had no title? It is true these are covenants running with the land; but it is not necessary that Durno should have had a legal estate, enduring, at all events, as long as his demise [219]

to Sir John Shelley. An estate by disseisin would be sufficient. *Palmer v. Ekins*, B. R., M. 2 G. 2, 2 Str. 817.

Baldwin, in reply.—The parol lease must operate as a new agreement with the executor. From the death of Durno the lease was at the pleasure of Hervey and Mackay, the executors. The plaintiff might perhaps have maintained another form of action, but he cannot recover in the present form.

Lord MANSFIELD.—The counsel for the plaintiff has removed our only difficulty by calling our attention to the words of the demise as set out in the declaration. If it had been a lease from year to year, it would have expired at the end of the year after the death without notice; but the present demise continues till the executor determines it by notice.

BULLER, Justice.—The pleadings would have been more accurate if they had stated that Durno had a long term of years then and yet to come. This would have been proved at the trial by the lease stated. A lease from year to year having continued three years may be stated as a lease for three years, and this is the same in substance.

Judgment for the plaintiff on the second count, and for the defendant on the first.¹

¹ See *Doe, dem. Shore, v. Porter*, B. R., H. 29 Geo. 3, 3 T. 13; *James v. Dean*, 11 Ves. 393.

STEWART v. DENTON, Spinster, Administratrix of DENTON.¹ Feb. 1.

Testator, a wine merchant, directed by his will that A. B. and C. D. should carry on his trade, and he bequeathed to them his stock of wines. Before the death of testator, certain wines belonging to him arrived in a vessel at the port of London, and the vessel was reported. After his death the wines were entered. Held that the executors, and not the legatees, were chargeable with the duties.

THIS cause (which was an action for money paid by the plaintiff to the [*220] use of the intestate, and for money had and *received by the intestate to the use of the plaintiff, and to which the general issue was pleaded) came on to be tried before Lord MANSFIELD, at Guildhall, at the sittings after last Michaelmas Term, when a verdict was found for the plaintiff, with £199 13s. 6d. damages and 40s. costs, subject to the opinion of the Court on the following case.

Peter Thomas, by his will dated the 14th of October, 1779, directed that the plaintiff and the intestate should have and carry on his trade or business of a wine-merchant as joint and equal partners, and gave and bequeathed to them all his stock in trade of wines and spirituous liquors which he should be possessed of at the time of his death; and after several pecuniary legacies, he gave and bequeathed to the plaintiff and his wife (who is since dead) all the rest, residue, and remainders of his money, goods, chattels, estate, and effects whatsoever and wheresoever, whereof he should die possessed, or whereof any other person or persons should be possessed in trust for him at his death, and appointed the plaintiff and two others his executors. The testator died on the 28d of January, 1780. On the 22d of January, 1780, eighteen pipes of wine, which had been ordered by the testator, arrived in the port of London, and the arrival of the ship, on board which the wines were laden, was reported before his death, but the wines in question were not entered or declared until after the testator's death. The plaintiff paid the

¹ S. C. 2 Chitty Rep. 456.

freight, duties, and insurance, amounting to £899 7s. 1d., upon the whole of the wines, without prejudice to the question, whether the same should be paid by the specific legatees in the testator's will.

The question upon this case was stated to be, whether the freight, duties, and insurance were payable by the plaintiff and the other specific legatees in equal proportions, or by the executors out of the testator's estate. If the Court should be of opinion that they ought to be paid by the specific legatees, then a verdict to be entered for the plaintiff, with £199 13s. 6d. damages and costs; but if the Court should be of opinion that they were payable by the executors out of the testator's estate, then a verdict to be entered for the defendant.

Baldwin, for the plaintiff.—The question is, whether this was a debt of the testator, which falls upon his executors, or a charge upon the legacy, which the legatees must pay before the legacy can be enjoyed. It is a charge upon the *legacy. Every estate devised is taken *cum onere*. There [*221] may be a distinction between the freight and the duties, for the freight is a lien, and the ship was reported before the death; but the duties are not payable till after the entry, which was subsequent. [BULLER, J.—are the duties payable on the reporting of the ship? *Mingay*.—Certainly they are. *Baldwin*.—The distinction in the case, between the times of reporting and entering, was made because the duties are only payable on the entry. Lord MANSFIELD.—As the goods were imported, nobody could, by not entering them, prevent the duties from becoming due.]

Mingay, contra.—The duties became due on the reporting of the vessel. The ship and goods from that time are in the custody of the officer. By the 5th Geo. 1, c. 11, goods not specified in the report are forfeited. Suppose the wine-cooper, or any other tradesman, had a lien upon them, would that be payable by the legatees?

Baldwin, in reply.—An officer was called to prove that the duties are not payable till the entry, and that till that time the merchant may send the goods to any other port. But this evidence was not gone into, because all the jury were acquainted with the practice, and the case was drawn up taking it for granted.

Lord MANSFIELD.—The question turns on the intention of the testator. It is a very forced construction to suppose that he intended to export this wine.

WILLES and ASHURST, Justices, of the same opinion. The testator's intention was, that the legatees should carry on his trade.

BULLER, Justice.—He meant them to carry on the trade as he had done, and that intention makes an end of the case. As to Mr. *Baldwin's* distinction, we must presume the duty payable on report, nothing in the case being against it.

Judgment for the defendant.

*SLATER v. CARNE.¹ Feb. 1.

[*222]

Plea to debt on bond, that after the making of the bond, the plaintiff by a deed of defeasance by him made, and sealed with his seal, released all obligations, &c., and delivered the said writing to one A. B., as an escrow, to be by him delivered to the defendant on a certain condition; that the defendant performed the condition, but that before A. B. could deliver the deed of defeasance plaintiff got the same covinously out of A. B.'s possession and detained it. Replication, that the writing in the plea mentioned was not the deed of the plaintiff, and concluding to the country. On demurrer, replication held good.

ACTION of debt on a bond for the penal sum of £400. The defendant,

¹ Cited 2 T. R. 442.

after craving *oyer*, and setting forth the condition, which was in the usual form, pleaded, 1. *Non est factum*; 2. That the plaintiff, after making the said writing obligatory, and before the day of exhibiting the bill of the plaintiff, viz., on the 1st of January, 1784, by his certain writing, purporting to be a *deed of defeasance*, by him made and sealed with his seal, reciting and referring to the bond, remised, *released*, and quit-claimed to the defendant all and all manner of obligations, bonds, debts, and demands whatsoever, both at law and in equity, which he ever had either solely by himself or jointly with any other person or persons whatsoever, from the beginning of the world to that day, and *delivered* the said writing of defeasance to one A. B. as an *escrow*, to be by him safely kept under the following condition, that is to say, that if the defendant should, within fourteen days from the said first day of January, in the year aforesaid, perform a journey to the city of York in and about the business of the plaintiff, then to deliver the said writing of defeasance to the defendant as the deed of the plaintiff, and not otherwise. (Then an averment that the bond mentioned in the declaration and in the writing of defeasance were the same.) That the defendant afterwards, and within the fourteen days, performed the said journey to the city of York in and about the business of the plaintiff; yet the plaintiff afterwards, and after the defendant had so performed the said journey, and before A. B. could deliver the said deed of defeasance to the defendant, fraudulently and covinously got the said deed of defeasance out of the hands and possession of the said A. B. into the hands and possession of the plaintiff, and still kept and detained the said deed of defeasance in his hands and possession, and refused to deliver it into the defendant's hands and possession, whereby the defendant was prevented from showing the same to the Court; and this he was ready to verify, &c.

[*223] The plaintiff replied to the second plea, that the said *writing in the said plea mentioned as purporting to be a *deed of defeasance* was not the deed of the plaintiff, and concluded to the country.

To this replication the defendant *demurred* specially, and showed for cause, 1. That the plaintiff hath, in and by his said replication, taken out and denied one of several dependent facts contained in the said plea of the defendant by him lastly pleaded in bar, which said several dependent facts in that plea contained constitute but one defence; and yet the plaintiff hath, in and by his said replication, tendered an issue to be tried by the country, whereas the said replication ought to have concluded with an averment as to the said matter therein contained, in order that the defendant might have had an opportunity to have rejoined thereto; 2. The general cause of demurrer.

Gibbs, for the demurrer.—There are two objections—one matter of substance, another matter of form. The first, that the replication states that this is not the deed of the plaintiff. It was not so pleaded. It was pleaded as an *escrow*, and not as a deed. It was delivered to a third person to be delivered to the defendant on certain conditions, and until the performance of those conditions it did not become a deed. Co. Lit. 36 a. Roll. Ab. 25, pl. 30 and 43. The replication of *non est factum* is therefore irrelevant.

As to the matters of form assigned as cause of demurrer, *Smith v. Dowers*, ante, vol. ii. p. 429, is an authority in point. It is there said by BULLER, J., that where the whole matter of the plea is denied in the replication, it must conclude to the country; but when a particular fact stated in the plea is selected and denied, the replication must conclude with an averment. Here the plea certainly consists of several facts. The first is the sealing; 2, the delivery as an *escrow*; 3, the condition; 4, the performance. None of these is sufficient alone: they are all dependent, and make one defence. In *Bush*

v. Leake, B. R., T. 23 Geo. 3, cited 2 T. R. 441, the distinction was taken between several distinct facts making one defence, and several points of defence. [BULLER, J.—As to the first objection, is there any other way in which the fact of sealing can be put in issue?] The plaintiff might have pleaded that he did not seal it.

Lord MANSFIELD.—The replication denies the execution of the [*224] instrument: that, if true, makes an end of the whole.

BULLER, Justice.—This question will always be made an engine of delay. There are some exceptions to the rules laid down in some of the cases cited. *Baynham v. Mathews*, B. R. T. 4 Geo. 2, 2 Str. 871, has been adhered to. This Court there said, that if the plaintiff would have been contented to have replied in the common form, without a traverse, he would have been right in concluding to the country. Some cases are so circumstanced that you may either conclude with an averment or to the country; but in such cases the practice has determined which method shall be adopted. *Gardiner v. Fisher*, M. 1 Geo. 1, cited 2 T. R. 443; *Sandford v. Rogers*, M. 1 Geo. 1, 2 Wils. 113; 2 T. R. 443.

Here there could be no inducement for want of new matter, and therefore there could be no formal traverse. It therefore comes to an express negative and affirmative, in which case a conclusion to the country is proper.

Judgment for the plaintiff.¹

¹ See *Hedges v. Sandon*, B. R., E. 28 Geo. 3, 2 T. R. 439; and the cases cited 1 Saund. 103, b (a), 5th ed.

SALUCCI and Another v. JOHNSON. Feb. 4.

The sentence of a foreign Court of Admiralty, that a ship warranted neutral is lawful prize, is not conclusive evidence that the ship is not neutral, if the grounds of the sentence appear and do not show a breach of neutrality.

THIS was an action on a policy of insurance, which was tried at Guildhall, at the sittings after last Michaelmas Term, before Lord MANSFIELD. The insurance was on the ship *Thetis*, described in the policy “as a Tuscan ship, on a voyage from Leghorn to London.” A verdict was found for the plaintiffs, subject to the opinion of the Court on a case which stated as follows.

The plaintiffs were Tuscan subjects resident at Leghorn, and were the sole owners of the ship *Thetis*. The said ship was a Tuscan ship, as described in the policy. Her cargo was neutral property, consigned to merchants in London. On the 31st of August, 1780, the ship sailed from Leghorn on the voyage insured, and on the 14th of September following *was [*225] captured in the course of her said voyage near Cape Tunis, on the coast of Barbary, by a Spanish privateer called the *Santa Theresa*, and carried into Carthagea. Proceedings were instituted against the said ship by the captors before some court or tribunal at Carthagea, to obtain condemnation thereof as lawful prize, and the following grounds were alleged by the captors to warrant such condemnation, viz., 1. That the said *Thetis* resisted and used force to prevent her being visited and searched, which is prohibited by the 5th and 6th articles of the cruising-ordinances of the King of Spain of the 1st of July, 1779; and that she fired into the privateer, and continued firing after the privateer had hoisted her Spanish flag: 2. That the said ship had no charter-party on board for the voyage in the prosecution of which she was captured, which was alleged to be in breach of the 16th article of the said cruising-ordinances. The captain of the said ship claimed restitution

thereof, and of the cargo, as Tuscan property; and in support of such claim it was alleged,—1. That the reason of his firing at the Spanish privateer was on account of her hoisting false colors,¹ from whence he suspected her to be a Barbary corsair: 2. To account for his not having a charter-party on board, that the *Thetis* was a general ship, and took in goods by the bale from all persons who chose to ship goods on board her; and that she had a manifest of her cargo on board, duly legalized. On the 24th of March, 1781, the ship and cargo were condemned by a sentence of the Court in Spain, of which the following is a copy:—

"The Tuscan ship named *Thetis*, Joseph Monteverdi, commander, with her tackle, and the effects which her cargo consists of, taken by the privateer commanded by Antonio Ferrer, are declared to be good and lawful prize; and let the whole be delivered to Don Giacomo Roquerols and others, his consorts, owners of the xebec *Santa Theresa*, commanded by the said Ferrer; and let attestations and the requisite passports be delivered to the said Monteverdi, that he may retire with his crew, according to form and custom; and before this sentence is published, let his majesty be consulted."

[*226] "The foregoing determination having been consulted *with his majesty, he was pleased to conform himself therewith, and to order that if the parties petition they may be heard. Which was notified to them."

This sentence was appealed from by the captain of the *Thetis*; and upon hearing the appeal, it was reversed; but the captors appealing from the sentence of reversal, the same was reversed, and the sentence of confirmation finally confirmed.

By the terms of the case reserved, the counsel for each party were to be at liberty to refer on the argument to the proceedings at large in the courts in Spain. If the Court should be of opinion that the plaintiffs were not entitled to recover, a nonsuit to be entered.

By the proceedings it appeared that the facts alleged by the captors as the grounds of condemnation, and also those stated by the claimant to support his claim, were proved; and that the officer of the court called the auditor, on whose report in favor of the captors the original sentence of condemnation was founded, seemed to have been of opinion that the circumstance of hoisting false colors was warranted by the general custom of nations, and was not therefore a sufficient justification of the resistance, and that a charter-party was by the ordinances made essential in all cases.

Piggott, for the plaintiffs.—The only question in this case is, whether the *Thetis* was a Tuscan ship; for the loss has certainly happened by one of the risks specifically insured against under the usual words "takings at sea, arrests, restraints, and detentions of all kings, princes, &c., barratry of the master and mariners," &c. I do not controvert that this policy contains an averment that the ship was Tuscan, tantamount to a warranty. The Court is therefore to consider whether anything appears in the proceedings to rebut the effect of the fact stated in the case, viz., that the averment was true. I admit the position, that a sentence of a Court of Admiralty is conclusive as to every matter it imports to determine: but where the ground on which the sentence of the Admiralty Court proceeded is ambiguous, this Court will open the question, and decide upon the truth of the case collected from other evidence. I also admit that it is not necessary that it should expressly appear on the face of the sentence what was the ground of condemnation, if it follows from the proceedings by clear and necessary inference. That

¹ It appeared by the proceedings that she first hoisted English and then Spanish colors.

principle was established *by the case of *Bernardi v. Motteux*, H. 21 Geo. 3, 1 Dougl. 575. So in *Mayne v. Walter* (*Mayne v. Walter*, B. R., E. 22 Geo. 3, ante, vol. iii. p. 79), the ground being that the ship had an English supercargo, the condemnation was held not to be conclusive evidence of enemy's property. The subsequent case of *Barzilai v. Lewis*, B. R., T. 22 Geo. 3, ante, vol. iii. p. 126, is perfectly reconcilable with the two former; for the condemnation there clearly went on the ground that the ship was not Dutch, not having those documents which all Dutch ships ought to have. In the present case it is impossible to show anything in the proceedings which tends to deny that the ship was Tuscan. The condemnation clearly went upon circumstances independent of the ground of enemy's property. There was nothing in any of the ship's papers that raised any suspicion. In short, upon a perusal of every part of the proceedings, the only grounds appear to have been those alleged by the captors, as stated in the case, viz., the resistance and the want of a charter-party. This is perfectly consistent with the fact of the ship being Tuscan, and affords no presumption that the Court in Spain condemned her as enemy's property.

Wilson, for the defendant.—I mean to admit explicitly that the *Thetis* was a Tuscan or neutral ship. But I shall make two questions: 1. What is the import and extent of this warranty; 2. Whether it has not been broken. 1. I contend that when the insured undertook that the ship was Tuscan, i. e. belonged to a neutral power, the meaning was that she should be liable to none of those risks to which a vessel the property of any of the belligerent powers would be liable; that the insured would do nothing which should expose her to any of those risks—nothing amounting to a breach of the neutrality. This is the true construction of that part of the contract, which is not unlike a warranty to sail with convoy; in which case, if the insured orders the ship to run away from the convoy in order to get first to the market, the warranty is broken, although she departed with the convoy. 2. Was there a breach of the warranty in the present case? The *Thetis* fired upon the Spaniard: that was an act of hostility, and if she had sunk her would *have been a ground of national complaint from Spain [*228] against Tuscany, unless she had some justification. That must arise from the conduct of the Spanish vessel. The principal reason why the sovereign of the country into which a captured ship is brought has a jurisdiction over the capture is, because he has jurisdiction over the person of his own subjects who bring her there, though not over the persons of the captured. The conduct of the Spanish captain has been examined before the competent court in Spain, and it has been there decided that he had done nothing to justify the force used by the Tuscan. That decision is conclusive as to his conduct, and therefore the act of hostility committed by the other was not justifiable, and was a breach of the neutrality. But exclusive of the sentence of condemnation, there is sufficient evidence that the Tuscan ship acted contrary to the general law of nations. It is a principle of that law, that when a neutral ship, carrying goods not contraband belonging to subjects of a belligerent power, is taken, she is to be released, but the goods become the property of the captor. Another principle is, that if such ship is found carrying contraband goods to the enemy, both the ship and goods are forfeited, vide *Le Caux v. Eden*, B. R., H. 21 Geo. 3, 1. Dougl. From these two principles it follows, as a necessary consequence, that the belligerent powers must have a right to stop and search neutral ships, for without such a power the other right would be totally nugatory and ineffectual, a right without a remedy. But such a right is incompatible with a right in the neutral ship to resist, and therefore resistance in such a case is an infraction of the neutrality. The proceedings

are inaccurate, and it would be as well either to hold a sentence of condemnation to be conclusive in all cases, or else not to receive it in evidence at all. However, I think it plain that in this case the condemnation was substantively grounded on the hostile act of firing and not on the want of a charter-party. The auditor states in his report, that the first hostile firing was by the *Thetis*, for that the guns previously fired by the *Santa Theresa* were only notices, and he thinks there was no reason for apprehending her to be a Barbary corsair. If this was the condemnation, it arose not out of any local [*229] ordinance or regulations, as in *Bernardi v. *Motteux*, and *Mayne v. Walter*, and which it does not seem to me necessary that neutral nations should be presumed to know, but out of the general law of nations. The act done in this case, by the law of nations, having deprived the ship of the protection to which Tuscan vessels were entitled, the warranty was infringed. [BULLER, Justice.—If the captain fired at the privateer illegally, what offence do you call it? Barratry is defined to be a malversation of the captain.] It cannot be considered as barratry, for that is *fraud or malversation of the captain to cheat the owners*. Here what was done was meant for the benefit of the owners, and therefore must be presumed to have been with their consent. The plaintiffs, at any rate, cannot be permitted to treat it as barratry in this action, because the declaration in an action on a policy of insurance must set forth the particular cause of the loss, and they have not declared on it as barratry. Besides, by appealing from the original sentence of condemnation, they affirmed the act of their captain. If they had thought it barratry, they would have come upon the underwriters in the first instance.

Piggott, in reply.—In the proceedings on the definitive appeal, greater stress is laid on the want of a charter-party than on the forcible resistance. I do not by any means assent to the principle that belligerent powers have in all cases a right to search neutral vessels. Is it possible that it should be against the law of nations to resist a search by a ship carrying a false flag, and in seas infested by corsairs and pirates, such as that where this capture took place? The armed neutrality, during the last war, denied in all cases the right of search. They made it a rule that free ships should make free goods; and having power to enforce the rule, they obliged the belligerent powers to submit to it, and would not suffer their vessels to be searched even when carrying contraband goods. If there is a right to search, it must depend upon the event; it must be done at the peril of the party, and be justified only if he find enemy's goods on board; the commanders of the ships of belligerent powers being in this respect in the situation of the officers of the excise or customs, whose justification depends on the event. This is proved by the known law, that if a ship is taken on the pretext or suspicion of having enemy's property on board, and none is found, the ship is not only restored, [*230] but the owner has costs and damages for *her detention, vide *Le Caux v. Eden*, B. R., H. 21 Geo. 3, 1 Doug. Here there were, in fact, no enemy's goods on board.

WILLES, Justice.—Is it laid down anywhere, that by the law of nations the belligerent powers have a right to search neutral ships?

Wilson.—I do not find that it is, but it seems to be a necessary consequence from the principles I have mentioned.

BULLER, Justice.—I am told by Sir George Collier¹ it is the universal practice, where the neutral ships have sufficient strength, to resist an attempt to search them.

Wilson.—I believe it may be so, but that is no proof of the right. It is

¹ He happened to be in the Court, waiting to hear the argument in the next case.

very frequent also for them to run away from convoy, and do other illegal acts.

Lord MANSFIELD absent.

WILLES, Justice.—There is no question but the ship and cargo were both neutral property. The definitions of barratry are very loose, but I cannot think this was barratry, because what was done was not for the captain's own benefit and to cheat his owners, but, on the contrary, was intended for their benefit. The remaining question is, whether the captain was guilty of such misconduct as by the law of nations deprived the ship of the protection to which neutral property was entitled. As to the want of a charter-party, that ground seems to be given up, and it is clear that the manifesto is sufficient without a charter-party where the goods are shipped parcel-ways or bale-ways. But it is contended that a neutral ship is obliged by the law of nations to stop to be searched. I do not find that there is any authority to that purpose. Such a rule would be particularly unjust in a case like this, where there were so many suspicious circumstances to induce the captain to escape (which he attempted) or resist by force. As the privateer first hoisted English and then Spanish colors, it was reasonable to conclude, so near the Barbary coast,¹ that she did not in truth belong to either nation, but was a Barbary corsair. The general usage of all nations, where the strength of the neutral vessel renders it safe to resist, and the practice of the armed neutrality, are contrary to the supposed right to search. The case would [*231] be different if goods liable to capture were found on board. The stoppage must be at the peril of the party, whose situation has been properly resembled to that of a custom-house or excise officer. Therefore, on consideration of all the circumstances, I do not think that this captain acted against the law of nations, but that his conduct was justifiable and prudent, and not such as can exempt the underwriters from answering for the loss, which clearly happened from a cause described in the terms of the policy.

ASHURST, Justice.—The question of barratry seems to be given up, or not strongly relied on; and I think that to constitute barratry the malversation must be in fraud of the owners, which was not the case here. I shall, therefore lay that question out of the case. Then, with regard to the two causes of condemnation stated in the cause,—1. I agree with Mr. Wilson in the principle, that where a ship is warranted *neutral*, she must so conduct herself as not to forfeit by her own fault the privileges attending neutrality. This is certainly required by the true meaning and spirit of such a neutrality. Has this ship so conducted herself? No authority has been cited to prove that it is against the law of nations for a neutral ship to resist a search. The general practice is the other way. Wherever the ship is sufficiently strong, it is done. In the beginning of the late war, the Dutch always resisted when they could, and after the armed neutrality, a search was never attempted. The stopping of a ship, therefore, for that purpose, seems to be, as argued by Mr. Piggott, at the peril of the party attempting to search. If she has force sufficient to accomplish it, and finds anything contraband or enemy's property on board, she is justified; if she does not, the stopping is wrongful, and so is plainly considered, as costs are always decreed in such cases. If this be the law, was there anything found in this ship which could warrant the captor in stopping her? Certainly not. The whole cargo was clearly neutral; therefore she might resist. 2. As to the want of a charter-party, that is clearly not required by the law of nations; and though it may be contrary to a particular ordinance of Spain, I think other states are not

¹ By the depositions it appeared to have been only nine miles from the Barbary shore.

bound to take notice of such ordinance, unless there should be some treaty subsisting between them and Spain by which they submit to be bound by [232] it. That is not the case here, *and therefore the loss falls within the clause of the policy, which insures against restraints and detentions of princes.

BULLER, Justice.—It is not necessary now to give an opinion on the question of barratry : but supposing the captain ought to have submitted to the search, I think the resistance would be barratry. I take the true definition of barratry to be, “a wilful misconduct of the captain to the injury of his owners,” and nothing further. This act was wilful, and exposed the owners to damages. But to lay that out of the case, I do not agree with Mr. *Wilson*, that when property is warranted neutral, it must continue so during the whole voyage. It is sufficient that it is so at the time when the risk commences, *Eden v. Parkison*, B. R., T. 21 Geo. 3, ante, vol. ii. p. 732. A war may break out the next day, and yet the underwriter will continue liable. But the great ground for the defendant is, that the ship was obliged to submit to examination. To this a decisive answer has been given ; for if the search were lawful at all events, and resistance unlawful, the Court of Admiralty could not decree costs and damages for detention in cases where no contraband or enemy's goods have been found. Therefore this ship was not liable to capture, by the law of nations, for having resisted ; and if she was by a local ordinance of Spain, the case falls within the words “arrests, restraints, and detentions of princes.” At first I doubted whether this might not be compared to the case of an illicit voyage, but, on consideration, I do not think it can ; because, though a ship is bound to take notice of the particular laws both of the country from whence she sails and of that to which she goes, and is, therefore, liable to forfeiture if she takes unlawful goods from the one or carries unlawful goods to the other, she is not also bound to take notice of the municipal laws of every country which she may pass by without stopping or trading there.

The *postea* to be delivered to the plaintiff.¹

¹ There was another case of *Salucci v. Gurney* on the *goods* on board the *Thetis*, which stood in the paper immediately after *Salucci v. Johnson*, and was of course decided by the decision of the other.

On the point of the effect of the sentence, the principal case has been repeatedly confirmed. *Calvert v. Bovill*, B. R., H. 38 Geo. 3, 7 T. R. 528 ; *Pollard v. Bell*, B. R., H. 40 Geo. 3, 8 T. R. 484.

*So it is said by Lord ALVANLEY, C. J., that there are a series of authorities [*233] in which the Courts have determined that if the condemnation does not plainly proceed upon the ground of enemy's property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation shall not be admitted as conclusive against the warranty of neutrality. *Baring v. Clagett*, C. B., T. 42 Geo. 3, 8 B. & P. 215 : see also *Bolton v. Gladstone*, C. B., T. 49 Geo. 3, 2 Taunt. 85 ; *Baring v. Christie*, B. R., T. 44 Geo. 3, 5 East, 898 ; *Fisher v. Ogle*, cor. Lord Ellenborough, 1 Campb. 418 ; *Bird v. Appleton*, B. R., E. 40 Geo. 3, 8 T. R. 562 ; *Lothian v. Henderson*, 8 B. & P. 499.

The doctrine in the principal case, that the right of searching neutrals is part of the law of nations, has been denied in *Garrells v. Kensington*, B. R., E. 39 Geo. 3, 8 T. R. 230 ; and in the case of *The Maria*, Paulsen, 1 Rob. Adm. Rep. 360.

CUNNINGHAM v. COLLIER, Bart. Feb. 4.

Covenant in a charter-party, that if a vessel should be captured, a sum of £975 should be paid for the vessel, according to an appraisal annexed. Plea, that by the appraisal the tackle, &c. were valued at £318 15s., and that before the capture,

by tempestuous weather, &c, the tackle, &c. had been damaged to the amount of £800; and as to the residue payment. On demurrer the plea was held bad. A person entering into a charter-party in his own name on the behalf of government is personally liable.

IN an action of covenant on a charter-party for letting to freight a snow of the plaintiff called the Elizabeth, then at Halifax in Nova Scotia, to the defendant (described as commander of his majesty's ship the Rainbow, and having the direction of his majesty's ships and vessels employed on the coast of Nova Scotia) on the behalf of his majesty, the declaration, after setting forth the covenants on the part of the plaintiff, stated, that in consideration thereof the defendant, for and on behalf of his majesty (among other covenants therein also set forth, but which it is unnecessary to mention), covenanted and agreed, "that if the said snow should happen to be burnt, sunk, or taken by the enemy in and during the aforesaid service, and it should appear that the same did not proceed through any fault, neglect, or otherwise in the master and ship's company, and that they made the utmost defence they were able, the sum of £975 Nova Scotia currency should be paid by his majesty, according to an appraisement made thereof and annexed to the said charter-party, by such persons as the defendant had *appointed." The [*234] declaration then averred that the snow was employed and continued in the service in the charter-party mentioned until she was captured; and that during her continuance in such service she was attacked, conquered, taken, and carried away by certain enemies of the king, and thereby became totally lost to the plaintiff; and that the capture did not proceed through any fault, neglect, or otherwise, of the master and ship's company, but that they made the utmost defence they were able: and that it afterwards so appeared, within the meaning of the charter-party, that the £975 Nova Scotia currency amounted to £877 0s. 0½d. sterling; and that his majesty, although often requested, had not paid the £877 0s. 0½d. to the plaintiff, but that the same still remained unpaid, contrary to the effect and meaning of the said covenant; and that so the defendant had not kept his said covenant with the plaintiff. The defendant pleaded: 1. the general issue; 2. as to £300 parcel of the £877 0s. 0½d. in the declaration mentioned, that by the appraisement annexed to the charter-party, the anchors, cables, sails, rigging, and other stores belonging to the ship, were valued at £313 15s. of Nova Scotia currency, and the hull, masts, yards, bowsprit, spare-gear, and boats at £661 5s. of that currency; and that after the making of the charter-party, and before the capture, the ship, by means of stormy and tempestuous weather and the dangers of the seas, was damaged in the anchors, cables, sails, rigging, and other stores, and the hull, masts, yards, bowsprit, spare-gear, and boats, to the amount of £300, part of the £877 0s. 0½d., and continued so damaged till, and remained lessened in value to that amount at, the time of the capture; and as to the residue of the £877 0s. 0½d. he pleaded that he had paid it. The plaintiff demurred generally to the plea concerning the £300, and joined issue as to the residue.

Wood, for the plaintiff.—There are no words in the charter-party which authorize the defendant to make any deduction for any damage which happened to the ship previous to the capture; and one of the events has taken place which was to entitle the plaintiff to the whole sum of £975. There is indeed a reference, in the usual course of those contracts, to an appraisement of the ship, and the different articles belonging to her. But that was merely the mode by which the sum to be stipulated for was calculated. If any deduction is intended for damage accruing to the ship, *her tackle, &c., [*235] there is an express provision that reasonable wear and tear shall be

deducted. If any integral part had been totally lost, there might have been a color for a plea of this sort; but that is not the case.

Baldwin, for the defendant.—1. I agree that this charter-party is not made in the usual form. If it had, there would have been no doubt of the defendant's right to a deduction. But the spirit, not the words, should govern in the construction of the contract. Government has paid (as the defendant asserts) the full value of the ship in the state she was in when taken. It is admitted by the demurrer that the value was lessened by the storm to the amount of £300. Why is there a reference to the appraisement, why is it annexed to the charter-party? If in case of capture or destruction by the enemy the whole sum was at all events to be paid, the mentioning the appraisement was nugatory and absurd. 2. There remains another question, *viz.* whether the action will lie against the defendant, as the contract is merely on behalf of the king.

Lord MANSFIELD.—It seems to have been a blunder not to provide for this case in the charter-party, as is the usual practice of the navy board. But we cannot get over our relieve against the express words of the covenant. There is an explicit stipulation to pay a sum certain. 2. As to the other point, there is nothing in it. It is daily practice to bring actions of this sort when the party has made himself specifically answerable.

Judgment for the plaintiff.¹

¹ In *Macbeath v. Haldimand*, E. 26 Geo. 3, B. R., 1 T. R. 172, in which it was held that an action would not lie against an agent of government upon a contract made by him in that capacity, the defendant had done nothing to render himself personally liable, as in the above case. But in *Unwin v. Wolseley*, E. 27 Geo. 3, B. R., 1 T. R. 674, it was held that the defendant was not liable on a charter-party into which he had entered on account of his majesty. In the latter decision, the principal case which seems opposed to it was not cited; see also *Allen v. Waldegrave*, C. B., M. 59 Geo. 3, 8 Taunt. 574; *Gedley v. Lord Palmerston*, C. B., E. 8 Geo. 4, 8 Brod. & Bingh. 275.

[*236]

**The KING v. WELCH and others.* Feb. 8.

Overseers are not entitled to charge the amount of the salary of an assistant overseer, though appointed with such salary at a vestry meeting.

THE accounts of the late overseers of the poor of the parish of Cheltenham in Gloucestershire having been allowed by two justices, their allowance thereof was appealed against by Welch and three other parishioners, when the Court of Quarter Sessions for that county confirmed such allowance, stating the case to be—

That at a vestry meeting held on the 2d of May, 1783, in the parish church of Cheltenham, pursuant to notice given and published in the church for that purpose, it was agreed by the persons present at that meeting, being upwards of 30 in number, and occupiers of houses and lands in the parish, that a person should be appointed to assist the churchwardens and overseers of the poor in the execution of their office (such parish being very extensive and much burdened with poor), and that accordingly one Giles Hooper was, by the majority of the persons then present at such meeting, being 26 in number (and amongst whom was Greenwood, one of the appellants), appointed such assistant, which 26 persons signified their consent thereto by signing their names at the foot of an agreement entered in the churchwardens' book; that the said Giles Hooper was by such agreement to be paid by the overseers of

¹ S. C. 1 Bott, 841, 6th ed.; Cald. 50.

the parish, out of the money to be collected by them for the poor-rates of the parish, the sum of £20 as a salary for executing the said office of assistant. The overseers in their accounts had taken credit for £20 as paid by them to Hooper for a year's salary for executing the office. Welch, not approving of the man though he approved of the measure, was present at the meeting, but did not sign the agreement; and the other appellants, Bendall and White, were not present at the meeting, nor ever assented to the appointment of such assistant. There are many other inhabitants and occupiers of houses and lands in the parish who were not present at the meeting, whose assent *was not had to the appointment of such assistant. It is not custo- [*237] mary in the parish to have such an assistant.

Couper and Clifford showed cause.—The ground taken by the other side is that there is no authority in any body to charge the parish with this new office and salary, but churchwardens and overseers have a right to charge everything necessary for the relief of the poor. It may be said, that if the parish is too large, other overseers may be appointed; but the policy of the stat. 13 and 14 C. 2, c. 12, is now disapproved of, and the Court does not encourage divisions of parishes. At all events that cannot be done in an appeal against overseers' accounts. In *R. v. Micklefield*, H. 25 Geo. 3, 1 Bott, 330, 6th ed., money expended in a lawsuit was only disallowed because there was no vestry: so here if the overseers had acted on their own authority it would have been wrong; but at the vestry all the inhabitants do or may attend, and their consent binds the parish.

Bearcroft, contra.—This is a question of great importance. It goes to repeal the stat. 43 Eliz. c. 2. The vestry have nothing to do with the appointment or accounts of the overseers. The statute, by directing the appointment of substantial householders, meant not only to secure the money, but also to throw the burden on those who were capable of bearing it. The order of appointment is bad unless it states them to be substantial householders. The poorer part of the parish are exempt from this burden; and yet how is this rate to be raised? By the taxation of every inhabitant. There would be great inconvenience in permitting it. The vestry would have a place in their gift, and there would be a contested election. If the Court should throw this burden upon other persons than substantial householders, they will not construe the statute liberally, but absolutely repeal it. If the present overseers are not sufficient, let others be appointed.

Lord MANSFIELD.—It is very hard, especially upon the officers who have paid the money, but I cannot make it a legal act. It is a great burden, but the statute meant to throw it on the overseers, and that they should do it without fee or reward.

Mr. *Bearcroft* said that it was certainly hard, and therefore, on the recommendation of the Court, he would undertake *that the £20 should be allowed, and that each side should pay their own costs on the order [*238] being quashed.

Order quashed.*

¹ But now, by stat. 59 Geo. 3, c. 12, s. 7, it shall be lawful for the inhabitants of any parish, in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by (*sic*) or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit.

But overseers themselves are not entitled to any salary. *Rev v. Glyde*, H. 53 Geo. 3, 2 M. & S. 323 (n).

The KING v. The Inhabitants of HIGHNAM.¹ Feb. 5.

Where an apprenticeship is intended, but to save expense an unstamped agreement is entered into, whereby the pauper agrees to serve the master in his business of a carpenter for four years, it is a defective apprenticeship, and not a hiring and service.

EDWARD READING, his wife and child, were removed from the parish of St. Aldgate, in the city of Gloucester, to the hamlet of Highnam, in the county of Gloucester, by an order of two justices, which upon an appeal to the Court of Quarter Sessions for the city of Gloucester was confirmed, and the following case stated :

The pauper was born in the hamlet of Highnam, the place of his father's settlement ; and when he was seventeen years of age, he went to William Evans, carpenter, of the parish of St. Mary de Crypt, for the purpose of being his apprentice for the term of four years, in order to learn the trade of a carpenter ; but, to save the expense of indentures and duty (four guineas consideration being paid by the pauper to his master), he and his master agreed to sign an agreement upon unstamped paper, which was accordingly done in the following words, viz.—“ Articles of agreement made, &c., on the 13th of July, 1772, between William Evans, of the city of Gloucester, carpenter, and Edward Reading, of Highnam, in the county of Gloucester, in consideration of the weekly wages or sums of money and covenant hereinafter mentioned, and which on the part of the said Evans are hereinafter agreed [239] to be paid, done, and performed : the said *Reading doth hereby covenant, promise, and agree to and with the said Evans in manner following, viz., he the said Reading shall and will faithfully serve the said Evans in the business or trade of a carpenter from the day of the date of these presents unto the full end and term of four years. The consideration of this agreement is, that I, William Evans, do pay to Edward Reading for every week's work he doth work 4s. and 6d. per week for the first year from the date hereof ; for the second year 5s. per week ; for the third and fourth years 6s. per week.”

It appeared by the parol evidence of the pauper, that, at the time of signing the agreement, it was further agreed by parol between the pauper and Evans, that the pauper should find his own diet and lodging, and that he was to be his own master on Sundays, and was not to be paid for the time he should play, but was to be paid a proportionable part only of the weekly sums for the time he should work. He played when he pleased, and was out of his master's service altogether at least a fortnight or three weeks in every year besides Sundays ; and at the end of every week his master deducted out of his weekly sums for the time he had absented himself from work. He went to his father's at Highnam every Saturday evening, and did not return to his master's house till the Monday mornings, and sometimes not till the Tuesday mornings, and served the whole four years in that manner.

Bearcroft and Clifford, in support of the orders.—It is stated that the contract was for the purposes of an apprenticeship, and this cannot therefore be turned into a hiring and service. It is clear also that it cannot be an apprenticeship, for the duty has not been paid, and for want of it the instrument is void ; *Cuerden v. Leyland*, 1 Bott, 517, 6th ed. This was clearly no service. The pauper was to be his own master on Sundays, and was to be paid on other days when he worked. The result was agreeable to the contract, for he was absent for months.

Wilson and Fendall, contra.—This is not a settlement by apprenticeship,

¹ S. C. 2 Bott, 397, 6th ed.

but by service. If it were not for the introductory part of the case, it would clearly be a service. If the parties intended an apprenticeship, it must be admitted that no settlement was gained; *Rex v. Whitechurch Canonieorum*, T. 5 Geo. 3, Burr. S. C. 540. *Though the first intent might have been an apprenticeship, yet the parties might and did change that in-^[*240] tent. The change was caused by the expense attending an apprenticeship, and they consequently resolved that it should be a service, and the pauper accordingly serves for four years. It has been insisted that there was a stipulation that the pauper should be his own master on Sundays; but that only appears by parol evidence, which ought not to have been received, and must be laid out of the case. The agreement creates an express obligation to serve the whole four years. It is like the case of spinning at so much per stone.

Lord MANSFIELD.—Nothing is so manifest as that these parties intended an apprenticeship, and sought to defraud the revenue.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice.—The original intention was never given up. It was all one transaction. Why else does the master take the four guineas? The object was to make an apprenticeship without expense.

Orders confirmed.¹

¹ This case has been frequently confirmed: see *Rex v. Laiden*, M. 40 Geo. 3, 8 T. R. 378; *Rex v. Rainham*, T. 41 Geo. 3, 1 East, 531; *Rex v. Mountsorrel*, E. 54 Geo. 3, 2 M. & S. 460; *Rex v. St. Margaret, King's Lynn*, M. 7 Geo. 4, 6 B. & C. 97; *Rex v. Combe*, E. 9 Geo. 4, 8 B. & C. 82: see also *Rex v. Eccleston*, E. 42 Geo. 3, 2 East, 298; *Rex v. Burbach*, E. 48 Geo. 3, 1 M. & S. 370.

The KING v. The Inhabitants of TOWCESTER.¹ Feb. 5.

If a wife is removed, and the order unappealed from, such removal is conclusive as to the husband's settlement, although it is not stated in the order that she was his wife.

By an order of two justices, bearing date the 31st of March, 1784, which stated that Mary Cross and her four children had come to inhabit in the parish of Towcester, in the county of Northampton, not having gained a legal settlement there, but that she had produced a certificate owning them to be settled elsewhere, and that the said Mary and her said children had been, and then were, actually chargeable to the parish of Towcester, the said Mary and her *children were adjudged to be settled at the parish of Harle-^[*241] stone, in the same county, and were removed to that parish. Afterwards an order was made, bearing date the 27th of May following, to remove Richard Cross from Harlestone to Towcester; and, upon an appeal, the Court of Quarter Sessions confirmed this last-mentioned order, and stated specially, that on the 17th of September, 1773, Richard Cross, Mary his wife, and four children (but different from those in the first of the two orders), being inhabitants legally settled at Harlestone, were duly certificated to the parish of Towcester; that they removed to Towcester and resided under the said certificate, and during such residence Richard Cross, the husband, gained a settlement by renting £10 a year; that afterwards, in the absence of the husband, Mary Cross and four of her children not mentioned in the said certificate, but born under it, having become chargeable to Towcester, were removed from thence to Harlestone by the order annexed to the case (viz., that above mentioned), which order was not appealed against; that afterwards Richard Cross, the husband, coming to his family at Harlestone, was, by the order appealed from, removed to Towcester.

¹ S. C. 2 Bott, 76, 6th ed.

Dayrell having obtained a rule to show cause why the last-mentioned order should not be quashed, the case stood this day for argument, but nobody appeared in support of the order.

The order of the 27th of May and of the sessions quashed.¹

¹ *Vide* *Rex v. Hinksworth*, H. 18 Geo. 3, 1 Dougl. 46, note [18]; *Rex v. Leigh*, M. 19 Geo. 3, 1 Dougl. 46; *Rex v. Rudgeley*, T. 40 Geo. 3, 8 T. R. 620.

The KING v. The Inhabitants of BROADHEMBURY. Feb. 5.

A girl of ten years of age who is by accident unable to maintain herself, and whom her father is unable to maintain, is placed in the workhouse, where she is supported and remains. Held that this is no emancipation.

THE father of Ann Turpin, single woman, gained a settlement in the parish of Broadhembury, in Devonshire, by renting an estate of £70 a year in that parish, during which time the pauper resided with him there. The father, being reduced in circumstances, was obliged to give up the farm; before [242] which time the pauper, when of the age of ten years,* had the misfortune to be rendered incapable of work by her hands being burnt off. The father after quitting the farm continued to live in Broadhembury for about two years, in a small cottage; and being unable to maintain the pauper, he procured her to be maintained by that parish, and she was accordingly placed in the workhouse, being then 20 years of age, where she remained and never returned to her father. In the beginning of 1783 the father left Broadhembury and went into the parish of Ottery St. Mary in Devonshire, where he took an estate of £23 a year, and resided thereon till Lady-day, 1784. He then took another estate of £20 a year in the same parish, where he continued to live.

Two justices by their order removed the pauper from the workhouse in Broadhembury to the parish of Ottery St. Mary; but upon an appeal to the Court of Quarter Sessions for Devonshire, a special order was made, which, setting forth the facts above stated, and that the Court were of opinion that the pauper was settled at Broadhembury, quashed the order of removal.

Bearcroft and *Clapp*, in support of the order of sessions.—The question is, whether the daughter's settlement follows the father's. At ten years of age she was incapable of maintaining herself, and her father was incapable of maintaining her. The parish has continued to maintain her since. No circumstance can more strongly separate her from her father's family than his inability. What is the legal meaning of emancipation? It is certainly not necessary that the child should have gained a settlement of its own. Marriage is not essential to it, nor housekeeping, nor other circumstances which occur in different cases. Emancipation then means such a separation as amounts to a ceasing of all dependence on the parents; and whenever it is the intent of the parents that the child should have its liberty, that is emancipation. It is not stated in this case that the pauper is of age, but in fact she is 24.

Lord MANSFIELD.—How is her being maintained by the parish an emancipation? There is no color for it.

WILLES and ASHURST, Justices, of the same opinion.

BULLER, Justice, declined giving an opinion, as he possessed some property in one of the parishes. Order of sessions quashed.¹

¹ *Vide* ante, p. 198, note c.

*The KING v. The Inhabitants of NORTH CRAY.¹ Feb. 5. [*243]

A servant a few days before the expiration of the year's service is committed for getting a bastard child, the master being one of the overseers and one of the persons apprehending him. At the expiration of the year he gives a bond to indemnify the parish, and is released. His master then pays his wages, deducting a sum for the time he has been in custody. Held that no settlement is gained by this service.

GEORGE GOLDEN, his wife, and four children were removed from the parish of Kingsdown, in Kent, to the parish of North Cray, in the same county. Upon an appeal, the Court of Quarter Sessions made a special order, setting forth the following facts, and confirming the order of removal.

The pauper about 17 or 18 years ago, being a single man, hired himself as a servant a few days before old Michaelmas day from that old Michaelmas day for a year, at the wages of £6 10s., to James Bedell, in the parish of North Cray. He went to his master on that Michaelmas day, and continued with him in the parish of North Cray until eight or nine days before Michaelmas day following, when, in consequence of being charged on oath with being the father of a bastard child likely to be born in and become chargeable to North Cray, he was apprehended by a warrant of a justice of the peace, and not giving security to indemnify the parish, or entering into a recognizance to appear at the next general quarter sessions, he was committed to Dartford Bridewell, his master then being one of the churchwardens of North Cray and one of the persons who apprehended him and went with him to the Bridewell. The pauper continued in prison till the 11th of October, and on that day executed a bond to indemnify the parish of North Cray against the expenses which the child might occasion to that parish if born there. On the same day his master, with the other officers, went to discharge the pauper; and the master then paid him his wages agreed for, except 4s. which he deducted, contrary to the consent of the pauper, for the time he had been in confinement. The pauper did not recollect whether he gave a receipt for the wages, but a receipt was produced and given in evidence to which he had set his mark, in the following form: viz., "Received, the 11th of October, 1766, of Mr. James Bedell, the sum of £6 6s. 1½d. in full for *my wages from the 10th of October, 1765, to the 29th of September, 1766." The parish officers consented to his release on [*244] the 11th of October, but the keeper of the Bridewell refused to discharge him without a proper authority, and on the 12th he was discharged by virtue of an order (set forth in the case) under the hand and seal of a justice of the peace.

Lee, Robinson, and Hervey, in support of the order of sessions. There are many cases on this subject, and in all of them the question has been whether the contract was dissolved. In this case both the master and the servant understood it to subsist. Suppose a man carried before a justice for an offence which he did not commit, and detained some time, would that be an interruption of the service? Suppose him to marry, which alters his condition materially with regard to the law of settlement, yet that does not operate as a dissolution. The present case is distinguishable from *R. v. Westmeon*, M. 22 Geo. 3, Cald. 129. Here there are strong circumstances of fraud. The master himself was one of the officers who apprehended the pauper, and he lies by till nearly the end of the year. At the end of the year they take his bond: why was it not taken sooner? It is not universally true that the Court will not take notice of fraud unless it is stated; *R. v. Frome Selwood*,

¹ S. C. 2 Bott, 345, 6th ed.; Cald. 495.

T. 6 Geo. 3, Burr. S. C. 565. If the fraud ought to be stated, the case may be sent back.

Lord MANSFIELD.—The point is perfectly plain. The pauper did not in fact serve a year. There is no evidence that the master consented to his absence, and no color of fraud. The pauper does not complete his service in consequence of his own criminal act. Order of sessions quashed.¹

¹ See *Rex v. East Kennett*, M. 26 Geo. 3, 2 Bott, 846; Cald. 562; *Rex v. Kenilworth*, T. 28 Geo. 3, 2 T. R. 598.

[*245] *The KING v. The Inhabitants of BIRDHAM. Feb. 5.

Where a certificate was granted to the parish of A., and afterwards other certificates to the parishes of B., C., and D., and the pauper was removed from D. to the certificating parish, held that the original certificate was discharged.

GEORGE EARWICKER and his wife were removed from the parish of Birdham to the parish of Walberton, both in the county of Sussex. On an appeal, the Court of Quarter Sessions quashed the order of removal, subject to the opinion of this Court on the following case :

The father of the pauper, about 30 years ago, went, by certificate, from the parish of Birdham to the parish of Walberton, under which certificate the pauper was born in Walberton. After the father had resided there about three or four years, he voluntarily removed from thence with his family to the parish of Arundel, where, under a fresh certificate from Birdham, he resided about five years. He then voluntarily removed to the parish of St. Andrew in Chichester, and there (under another fresh certificate from Birdham) he resided about ten years. He then voluntarily removed with his family to the parish of All Saints, otherwise the Pallant, in the same city, and there resided about six months under another certificate from Birdham ; when, falling into distress, and applying for relief from the parish officers of the last-mentioned parish, he was relieved by them, and thereupon they obtained an order of two justices by which he was removed to Birdham (then having only five children); but the pauper then being employed by one Hutten to look after horses as a stable-boy in the parish of St. Andrew, adjoining to that of All Saints, he was not removed with his father, but in about two or three days afterwards went to his father at Birdham, and there lived with him about six months as part of his family, and then, being 16 years of age, put himself apprentice, by indentures legally executed and stamped, to one Noyce of Walberton, for three years, the greater part of which time, and particularly the last two months, he served with his said master in Walberton.

Mingay, in support of the order of sessions.—The argument on the other side must be, either that the certificate was discharged or deserted. But the original certificate from Birdham was still in force as to all the family, or at least as to the son. No doubt a certificate removed on is at an end ; but there may be twenty certificates to different parishes ; for what is a certificate [*246] but an acknowledgment ? There is *no decision against this doctrine.

The other side must rely then on the length of time. *R. v. Taunton St. Mary*, T. 29 & 30 Geo. 2, Burr. S. C. 142, went on a great many circumstances. This pauper was not removed, not being chargeable, and there is no case to show that the certificate shall be discharged as to him. Mr. Justice ASTON inclines to think, Burr. 748, that only those who ask relief are to be removed, and that the certificate is in force as to the rest.

Bearcroft, Hurst, and Steele, contra.—There was never a clearer case than the present. The admissions on the other side decide the whole question. An order of removal from the same place makes an end of the certificate. It becomes *functus officio*. An order of removal from a third place is still stronger. Here are several removals in fact followed by a removal in law. There is the strongest desertion in fact. He is born since the certificate, and not named in it. He is within the certificate by law only. A new certificate is a discharge of the old, although there is no decision on the point. A certificate is to a particular place, and is gone when there is a new one to another. The boy was an object of the order of removal, for it is of the father and four children. Some days afterwards the boy goes to his father: in what character but as part of his family? *R. v. Sudbury*, 28 Geo. 2, Burr. S. C. 373, is decisive. The only difference is, that here the removal is from a third place. Any order of removal discharges a certificate, because there is no longer any occasion for it. There is also another ground, which is, that the boy was capable of gaining a settlement by apprenticeship, and did so. He was not received under the certificate, but as an independent person.

Lord MANSFIELD.—The original certificate was discharged by the subsequent certificates; but if that were not so, it was certainly discharged by the order of removal.

WILLES, ASHURST, and BULLER, Justices, of the same opinion.

Order of session quashed.¹

¹ The leaving the parish of Walberton, and residing for five years in Arundel, was in itself a discharge of the certificate: see *Rex v. Newington*, T. 26 Geo. 3, 1 T. R. 354; *Rex v. St. Michael's, Coventry*, H. 34 Geo. 3, 5 T. R. 526.

*WHITE v. LEDWICK, Widow, Administratrix of LEDWICK. [247]
Feb. 8.

The words "value received" are not essential to constitute a bill of exchange.

THIS was an action by the endorsee of a bill of exchange against the administratrix of the drawer.

The *first count* of the declaration stated, that the drawer, on the 27th of July, 1775, according to the custom of merchants, made his certain bill of exchange, and directed it to the acceptor, "by which said bill of exchange he required the drawee to pay to the endorser or order, on the 27th of July, which would be in the year 1777, £450, with interest half-yearly, that is to say, with interest for the same at and after the rate of £5 for the forbearing of £100 for a year, payable half-yearly on account of him the said drawer." It then stated, in the usual form, the delivery to the endorser, the acceptance by the drawee, the endorsement to the plaintiff, the refusal of payment by the drawee when the bill became due, and notice thereof to the drawer, "by means whereof, and according to the said usage and custom of merchants, the said drawer became liable to pay the £450 and interest to the plaintiff."

The defendant *demurred* generally to this count.

Chambré, in support of the demurrer, contended, that to constitute a bill of exchange it is necessary that it should purport to be *for value received*; and as that essential part was wanting in this bill, as stated by the plaintiff, his declaration could not be maintained. He said, besides several authorities

¹ Bayley on Bills, 84, 4th ed., note of S. C.

in the writers on general law in his favor, the two cases of *Banbury v. Lisset*, Guildhall, B. R., T. 17 Geo. 2, 2 Str. 1211, and *Pierce v. Wheatley*, Guildhall, C. B., T. 1742, cor. WILLES, Ch. J., 4 Vin. 241, were in point, and that there were no decisions to the contrary. In the first of those two cases three objections were made, viz., 1. that the bill was not payable *to order*; 2. that it was payable out of a *particular fund*; 3. that it was not said to be *for value received*. The Chief Justice ruled it not to be a [*248] **bill of exchange*. He said it was not in the power of parties to make what form they please pass for such a bill, which ought to be agreeable to the *lex mercatoria*, and thought the bill bad on the objection as to the fund. However he left it to the jury, who were a special jury of merchants, and they found it no bill of exchange on the objection that it was not stated to be *for value received*. In like manner, in *Pierce v. Wheatley*, a bill which ran in these words, "At six weeks after date pay to B. W. or order eight guineas for your humble servant," was ruled by WILLES, Chief Justice, not to be a bill of exchange within the custom of merchants; and though the reason why it was so held is not mentioned in Viner, where the case is reported, yet as it differed in nothing from the common form, except in the omission of the words "*value received*," that omission must have been the ground on which it was held to be bad.¹ This question was agitated lately in the Court of Common Pleas in a case of *Dawkes v. Lord Deloraine*, T. 11 Geo. 3, 2 W. Bl. 782; 3 Wils. 207, S. C.; but there were several other objections to the bill in that case besides the present, and the Court decided on the others without going into this point. During the argument, GOULD, Justice, mentioned a case at the Old Bailey for forging a bill of exchange, tried before him, and where he held that the instrument was not a bill of exchange, not being payable to order or *for value received*.

Bower, for the plaintiff.—It has been the general practice to insert the words "*value received*," and formerly it was thought necessary to insert them; but there are many and some old cases where the contrary has been held. In *Cramlington v. Evans*, B. R., E. 1 W. & M. 1 Show. 4, Lord HOLR expressly says, "If the drawer mentions *value received*, then he is chargeable at common law; if no such mention is made, then you must come [*249] upon the custom of merchants only." In the **case of Jenny v. Heale*, B. R., T. 10 Geo. 1, 8 Mod. 265; 2 Ld. Raym. 1361; 1 Str. 591; called in Ld. Raym. and Str. *Jenny v. Hale*, as reported in 8 Modern, it appears that the want of the words "*value received*" was the only objection insisted on in the Court of Common Pleas, where the cause originated, on the demurrer to the declaration. It was there overruled, and judgment given for the plaintiff. On the writ of error it was laid down, that though in the old bills of exchange those words were inserted, it is not now necessary.² Accordingly, though the judgment was reversed, it was upon another ground, viz., that the note was only an order to a cashier to pay a sum out of a particular fund. In the two cases cited on the other side there were other points sufficient to ground the decision, and in the first-mentioned particularly it does not appear that the Chief Justice gave any opinion on the present question. On principle there seems to be no reason for inserting the words "*value received*." They are not necessary in a *promissory note*;

¹ The bill in *Pierce v. Wheatley* bore date in 1736, and was offered in evidence on a set-off; and the Chief Justice held, 1, that it was not a bill of exchange; 2, that it could not be received as evidence of *money lent*, because no consideration either appeared on the face of it, or was offered to be proved; 3, that if it had amounted to a bill of exchange, the *laches* of the defendant in not demanding the money, and giving notice in case of non-payment for so long a time, would effectually discharge the plaintiff.

² Those do not seem to be the words of the Court; 8 Mod. 267.

and in *Grant v. Vaughan*, B. R., T. 4 Geo. 3., 3 Barr. 1516; 1 Blackst. 485, WILMOT, Justice, said, "Bills of exchange are only promissory notes to pay such a sum in case the drawer does not," 1 Blackst. 489.

Chambré, in reply, observed, that the words imputed to Lord HOLT in *Cramlington v. Evans* must be misreported, for that in every case the action on a bill of exchange must be founded on the custom of merchants.

LORD MANSFIELD.—I wished to see if the counsel for the defendant could cite any authority that would be binding upon us as to this question, but there is none, and the objection has no foundation in reason. The essence of a bill of exchange is, that it is negotiable, or payable to order, and that it is payable generally, not out of a particular fund.

ASHURST, Justice.—I am of the same opinion. The words "*value received*" are only inserted *ex majori cautela*, in order that the payee may be able to recover upon it in an action for money lent, or money had and received, in case the instrument should be defective in other respects as a bill of exchange.¹

BULLER, Justice.—I am of the same opinion. The two *cases [*250] cited by Mr. *Chambré* are only determinations at Nisi Prius. The question was argued very elaborately in the Common Pleas in the year 1764, though no judgment was given upon it: but it then appeared that the books on mercantile laws contradict one another on this point, and that there is nothing certain in the usage. Judgment for the plaintiff.²

¹ This seems to be what Lord HOLT meant in the words cited from *Cramlington v. Evans*.

² See also *Popplewell v. Wilson*, B. R., H. 6 Geo. 1, 1 Str. 264. Where the note mentions the consideration, it is not necessary to set out the consideration in declaring upon it. *Coombe v. Ingram*, B. R., E. 5 Geo. 4, 4 D. & R. 211. So it is no variance where a bill or note contains the words "*value received*," to omit them in the declaration.—Per Lord ELLENBOROUGH, C. J., *Grant v. Da Costa*, B. R., H. 55 Geo. 3, 8 M. & S. 351. The words "*value received*" in a bill payable to a third person mean value received by the drawer; *ibid.*: but when the bill is payable to the drawer's own order, those words mean value received by the drawer. *Highmore v. Primrose*, B. R., E. 56 Geo. 3, 5 M. & S. 65. So "*value received*" in a note means "*value received from the payee*." *Clayton v. Gosling*, B. R., E. 7 Geo. 4, 5 B. & C. 361. If the words "*value received*" appear on a bill of exchange payable to the drawer's own order, debt may be maintained by the drawer against the acceptor. *Priddy v. Henbrey*, B. R., E. 4 Geo. 4, 1 B. & C. 674; 8 D. & R. 165, S. C. Coal-notes given in pursuance of the statute 8 Geo. 2, c. 26, s. 7, should contain the words "*value received in coals*:" see *Wigan v. Fowler*, 1 Stark. N. P. C. 468.

DOE, Lessee of LAWSON and others v. LAW, widow.¹ Feb. 9th.

The Court will stay proceedings in a second ejectment brought on the same title till the costs of the former ejectment be paid, though the lessors of the plaintiff are different.

THE title of this case was, "Doe on the several demises of Francis Lawson, Esquire, Ralph, Earl Verney, Robert Chambers, and Anthony Patrickson, deceased, James Knox, William Coningesby Davies, and Edward Langley, executors of Robert Chambers deceased, Robert Chambers, heir-at-law of the said Robert Chambers deceased, Anne Prince, Susannah Molynaux, and Mary Chadwick v. Sarah Law, widow."

On Friday, the 28th of January, *Lee* had obtained a *rule to show [*251] cause why the proceedings should not be stayed until the lessors of the

plaintiff should pay to the defendant her costs (to be taxed by the master) occasioned by a former ejectment in this court, wherein one Charles Chadwick was the lessor of the plaintiff, and the present defendant was defendant, and why they or their attorney should not pay her also the costs of this application.

The affidavits on which the rule was moved for were made by the defendant's attorney and three other persons. They swore that the former ejectment and this were both brought for the recovery of real estates formerly belonging to Sir Andrew Chadwick, and both related to the title to the same premises; that they believed the present lessors, or some of them, claimed title under Charles Chadwick, the former lessor,—one of them, viz., Lawson, being clerk of the peace for the County of Surrey, and Charles Chadwick having been formerly discharged under an insolvent act; that the former cause was tried by a special jury at the sittings in Hilary Term, 13 Geo. 3, when a verdict was found for the defendant; and that the costs were afterwards taxed, but had not been paid.

Law now showed cause upon two affidavits. By the first, Prince, Molyneux, and Chadwick, three of the lessors of the plaintiff, swore, that they understood and believed that they were entitled to the premises as heirs-at-law to Sir Andrew Chadwick, being daughters of John, the son of William, who was brother to Sir Andrew; and that they understood and believed that the defendant was a more distant relation, claiming only to be the daughter of Robert, brother to Ellis, Sir Andrew's father. By the second affidavit, the attorney for the lessors of the plaintiff swore, that Charles Chadwick, the former lessor, did not die till 1784; that he was the son of another Charles; and that Prince, Molyneux, and Chadwick claimed as the daughters and heirs-at-law of John, the nephew of Sir Andrew, and brother to Charles, the father of the former lessor; and he admitted in his affidavit that the other demises in the declaration were meant to be laid on titles derived to the several lessors under Charles Chadwick, the lessor in the former ejectment; Lawson having been clerk of the peace for Surrey when he was discharged, Robert Chambers being heir-at-law, and Knox, Davies, and Langley executors of Robert Chambers deceased, who was assignee of Lawson, and Lord [252] Verney, *Robert Chambers, and Patrickson, being grantees of the premises from Charles Chadwick.

Law contended that the real plaintiffs in this action, viz., the three women, not claiming through or under the lessor in the former ejectment, ought not to be compelled to pay the costs of that ejectment. He cited *Tredway v. Harbert*, B. R., E. 1 W. & M. Comb. 106, and *Deuce v. Dolben*, B. R., E. 1 W. & M. Comb. 110, for *HOLT*, Chief Justice's, opinion, that where the new lessor was different, the Court could not take notice of the title (though sworn to be the same), so as to stop proceedings till the payment of costs. He also mentioned *Doe v. Hatherley*.¹

Lee and *Topping*, in support of the rule, insisted that the Court must take it upon the affidavits that the three maternal lessors claimed through the former, for there was no positive affidavit that their title was different, or that John, their father, was the elder brother of Charles, father to the former lessor, and therefore the Court must presume that he was a younger brother. That if the mere change of the name of the lessor were to prevent the payment of former costs, the general rule would be constantly evaded. They cited *Fairclaim v. Thrustout* (8 T. R. 646, S. C. cited), a very late case in this

¹ B. R., E. 14 Geo. 2, 2 Str. 1152. In the two cases in *Comberbach*, the Court differed, and "the matter was put at large;" and in the case of *Strange*, though the former demise was by two, and that in which the application was made only by one of the two, the other (husband) being dead, the rule was granted.

court, E. 24 Geo. 3, ante, vol. iii. p. 405, where a rule like the present having been obtained, the Court would not discharge it on the mere ground that the former ejectment was on the demise of A., and this on the joint demise of A., B., and C. They said it did not appear from that circumstance that the title was different, for that B. and C. might only be trustees; and they enlarged the rule expressly to give the defendant's counsel time to produce an affidavit that the title was different.

Law agreed that upon the affidavits John was to be taken to be a younger brother.

LORD MANSFIELD.—The Court has arrived by degrees at the practice on which the present rule is founded. It was adopted in order to prevent the hardship of frequent ejectments *brought on the same title, and was [*253] the more reasonable as in real actions all representatives of the losing party were for ever concluded from setting up the same title. I think it is a very beneficial practice, and the Court are bound to extend it, as cases arise falling within the same principle. It is admitted here that the present claimants derive title through the former. In other words, this action is brought upon the same title.

The rule made absolute.¹

¹ Where the lessor of the plaintiff had been the defendant in the former ejectment, the Court granted this rule. *Thrustout, d. Williams v. Holdfast*, B. R., E. 35 Geo. 3, 6 T. R. 223. So where there was another defendant in the second ejectment; *Keene, d. Angel v. Angel*, B. R., T. 36 Geo. 3, 6 T. R. 740; see also *Doe, d. Walker, v. Stevenson*, C. B., H. 42 Geo. 3, 3 B. & P. 22.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

IN THE TWENTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

ATKINSON, Assignee of HOPKINSON and BATES, Sheriff of Middlesex,
v. SAUNDERSON.¹ April 19.

Declaration on a bail-bond stated the defendant was arrested by virtue of a writ "before then, to wit, on 2d November, issued out of the court of our lord the king before the king himself, the said court then and there being held at Westminster:" held bad in special demurrer. A variance between the sum in the special original and the sum in the condition of the bail-bond is immaterial.

DEBT on a bail-bond. The declaration was as follows:—"The plaintiff, assignee of Hopkins and Bates, sheriff of the county of Middlesex, according to the form of the statute in such case made and provided, complains of the defendant, otherwise called, &c., being in the custody, &c., of a plea that he render to the plaintiff the sum of £208 of good and lawful, &c., which he owes to and unjustly detains from him; for that whereas the defendant, after the 1st day of Trinity Term, 1706, to wit, on the 10th of November, 1784, at Westminster, in the county of Middlesex, was arrested by the said Hopkins and Bates, then and now sheriff of the county of Middlesex aforesaid, by virtue of a certain writ of our lord the king, called a special *capias ad respondendum*, before then, to wit, on the second day of November then and now instant, issued out of the court of our said lord the now king before the king himself, the said court then and there being held at Westminster aforesaid, in the county aforesaid, directed to the sheriff of the said county [*255] *of Middlesex, by which said writ our said lord the king commanded the said sheriff that he should take the defendant if he might be found in his bailiwick, and keep him safely, so that he might have his body before our said lord the king on the morrow of St. Martin's, wheresoever our said lord the king should then be in England, to answer the plaintiff in a plea of trespass on the case to the damage of the plaintiff of £133; and that the said sheriff should then have that writ—which said writ, before the said arrest, was duly marked or endorsed for bail for £104 pounds and upwards, by virtue of an affidavit before then duly made and filed in the said court of our lord the king before the king himself, of the cause of action of the plain-

¹ S. C., cited 8 T. R. 184, *nomine* Atkinson v. Anderson.

tiff against the defendant in that behalf: and whereas Hopkins and Bates, so being sheriff of the said county as aforesaid, of and upon that arrest took bail for the appearance of the said Nathaniel at the return of the said writ, according to the exigence of the said writ; and upon that occasion the defendant afterwards, to wit, on the said 10th of November, 1784, at Westminster aforesaid, in the county aforesaid, by his certain writing obligatory called a bail-bond, sealed with his seal, and now shown to the said court of our said lord the king before the king himself, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said Hopkins and Bates, then and now being sheriff of the said county by the name of, &c., in the sum of £208 of good and lawful, &c., to be paid to the said sheriff or his assigns when he the said defendant should be thereunto afterwards requested, with a condition to the said writing obligatory subscribed, that if the defendant did appear before our lord the king on the morrow of St. Martin, wheresoever his majesty should then be in England, to answer to the plaintiff in a plea of trespass on the case to the damage of the plaintiff of £130, then the said obligation should be void and of no force, otherwise to stand and remain in full force, vigor, and effect, as by the said writing obligatory, and the said condition thereof, relation being thereunto had, may more fully and at large appear; and whereas the said Hopkins and Bates, sheriff of the said county as aforesaid, afterwards, to wit, on the 19th of November, 1784, at Westminster aforesaid, in the county aforesaid, at the request, costs, and charges of the plaintiff, the said plaintiff in the said suit, assigned the said writing obligatory to him, by *then and [*256] there endorsing that assignment on the back of the said writing obligatory, and attesting the same under his hand, and sealing it with the seal of his office of sheriff of the said county of Middlesex, in the presence of two credible witnesses, according to the form of the statute in such case made and provided (4 Anne, c. 16), as by the said assignment endorsed on the said writing obligatory, and duly stamped before the exhibiting bill of the plaintiff, according to the form of the statute in such case made and provided (*Id.*) and now shown here to the court of our said lord the king before the king himself at Westminster aforesaid, the date whereof is the same day and year last aforesaid, more fully appears; and the plaintiff in fact says that the defendant did appear before our said lord the king on the morrow of St. Martin aforesaid, in the said condition mentioned, according to the form and effect of the said condition, whereby the said writing obligatory became forfeited, and whereby, and by force of the statute in such case made and provided (*Id.*), an action accrued to the plaintiff as assignee of the said sheriff to demand and have of and from the defendant the said £208 above demanded; yet the defendant (although often requested so to do) hath not yet paid the said £208, or any part thereof, to the said Hopkins and Bates before the said assignment, nor to the plaintiff as assignee as aforesaid since the said assignment, but he to pay the same, or any part thereof, to them, or either of them, hath hitherto wholly refused, and still doth refuse to pay the same to the plaintiff, to the damage of the plaintiff of £20; and therefore," &c.

The defendant *demurred* specially, and showed for cause, 1. That the plaintiff had, in and by his said declaration, alleged that the defendant was arrested by virtue of a certain writ of our lord the king, called a special *capias ad respondendum*, instead of out of the court of our said lord the king before the king himself, on the second day of November then instant and now past, the same being in vacation time, and on a day when the said court was not nor could be legally held. 2. That the plaintiff had, in and by his said declaration, further alleged, that the said court was then held at Westminster afore-

said, in the county aforesaid, which is altogether impossible. 3. That the [*257] said writ *appearing in and by the said declaration to have been sued out in vacation time, and on a day when the said court was not nor could be legally held, is void in law. 4. That it appears in and by the said declaration that the defendant was arrested on a void writ, and that the said writing obligatory therein mentioned being founded on such writ, is also void. 5. That it appears that the said writ was to answer to the plaintiff in a plea of trespass on the case, to the damage of the plaintiff of £138; and the said writing obligatory appears to be taken for the appearance of the defendant to another and different cause of action, to wit, in a plea of trespass on the case, to the damage of the plaintiff of £130, wherefore the said writing obligatory was and is void in law. 6. That it appears in and by the said declaration, that the said writing obligatory was assigned to the plaintiff by the said sheriff of the said county of Middlesex before the expiration of the time allowed by the rules and practice of the said court of our said lord the king before the king himself for the defendant to appear in the said court to answer the plaintiff in a plea of trespass on the case. 7. The general cause of demurrer.

Wood, for the demurrer.—On the first cause of demurrer *Estwick v. Cooke*, B. R., E. 2 Geo. 2, 2 Ld. Raym. 1557, is in point. That case has never been overruled. *Hart v. Hingeston*, B. R., E. 10 Geo. 3, 5 Burr. 2586, is distinguishable. In that case it was not alleged, as in *Estwick v. Cooke*, that the court was then held. The writ was stated to be sued “out of the Court of the said lord the king before the king himself at Westminster,” which was held only to be the style of the Court. [BULLER, J.—“At Westminster” is no part of the style of the court. It meant that the Court was held there.] In *Hart v. Hingeston* the question did not arise, as here, on a special demurrer. As to the second objection, it appears that there was a variance between the cause of action in the writ and in the condition of the bond. The sheriff was bound to take the bond according to the exigency of the writ, and especially in the present case, the writ being an original, upon which the plaintiff could not have declared for a different *damnum*.

Chambré, contra.—*Estwick v. Cooke* is in point, but has been overruled [*258] by *Hart v. Hingeston*. In the latter case *the Court stated that they were inclined to overrule *Estwick v. Cooke* if it had been necessary. In *Hart v. Hingeston* the Court went on the principle that they would take notice of the writ’s *issuing* in vacation; and the distinction taken was, that the writ was not stated to have been *tested* in vacation. So in this case there is no allegation as to the *teste*. With regard to the averment that the Court was sitting, it is immaterial and not traversable: so also is the day, and a different time might be shown in evidence.

As to the second point, the variance in the sum mentioned in the writ and in the bond is immaterial. A bond good under the statute of Henry VI., 23 H. 6, c. 9 § 5, will be good at this day, with this difference, that now the bail must be taken for the sum sworn to. The statute of Henry VI. requires the sheriff to take a bond conditioned for appearance at the day, which is here correctly stated; but there are many cases in which it has been held that the bond is good though there is a variance from the *ac etiam* of the writ. *Gardiner v. Dudgeat*, B. R., E. 31 Car. 2, 2 Show. 51; *Rench v. Britton*, B. R., E. 2 Geo. 1, 10 Mod. 327; *Cudwell v. Dunkin*, B. R., H. 31 & 32 Car. 2, Sir T. Jones, 137.

Wood, in reply.—The case of *Hart v. Hingeston* was twice argued. It was on the first argument that the Court spoke of overruling *Estwick v. Cooke*. On the second argument they did not overrule it, but distinguished it. It was said that matter of form cannot be taken advantage of on general

demurrer, but ought to be assigned as cause on special demurrer; and it is assigned here. As to the second point, it was said in *Gardiner v. Dudgeat* that the *ac etiam* is not of the substance of the writ, and it was therefore held that a variance would not hurt. But this is a special original which cannot be varied from. In an action by bill a different sum may be declared for.

LORD MANSFIELD.—The first objection, as it is raised on special demurrer, is fatal. With regard to the other, the variance in the sum is not material, for bail is taken for the sum endorsed.

BULLER, Justice.—The Court must take notice that it was not sitting in vacation, and therefore the objection being pointed out by special demurrer is fatal. As to the other, I think that all the cases, and particularly that from Sir *Thomas Jones*, show, that if the time and place are correctly stated, a variance in other circumstances will not hurt. In that case [*259] the variance was more material than in the present, being in the form of action. The *ac etiam* is not part of the substance of the writ. The question then arises, whether this, being by original, distinguishes it from the cases cited. All that is required of the bail is to justify in double the amount of the sum sworn to and marked, so that the sum in the writ does not govern.

Mr. *Chambré* had leave to amend.¹

¹ But where a writ was stated to have been issued in vacation, but there was no averment of the court being *then held*, the Court said that they would take notice that process may be issued in vacation, and that an allegation that is so issued is good. *Harrington v. Taylor*, B. R., E. 52 Geo. 3, 15 East, 378. And where, as in the principal case, the averment was that the plaintiff heretofore, to wit, on the 21st July, sued and prosecuted out of the court of our lord the king of the bench, the said court then and now at Westminster, &c., to which there was a special demurrer, the Court of Common Pleas held that the time being stated under a *videlicet* was immaterial, and might be rejected as surplusage, and that it was sufficient if it appeared in substance that the writ was issued out of the court; *Lockett v. Plummer*, C. B., E. 2 Geo. 4, 2 B. & B. 659.

As to the second point, see *Owen v. Nail*, B. R., T. 36 Geo. 3, 6 T. R. 702.

MEGGS and Another v. FORD.¹ April 20.

Where the plaintiff sues out process as assignee, and declares in his own right, the proceedings may be set aside; but the Court will allow the plaintiff to amend, on payment of costs.

SHEPHERD having obtained a rule to show cause why the proceedings in this case should not be set aside on the ground that the plaintiffs had arrested the defendant on a writ sued out by them as assignees of a bankrupt, and had afterwards delivered a declaration in their own right,

Baldwin showed cause, and contended that as the writ was only to bring the defendant into court, the plaintiffs might declare afterwards as they pleased. [BULLER, J.—That is where the plaintiffs declare by the by,² but here the plaintiffs have declared in chief.]

**Shepherd*, contra, said, that the plaintiffs might declare specially [*260] on a general writ, but not generally on a special writ.

The Court thought this distinction right, and were going to make the rule

¹ S. C. cited *Tidd's Pr.* 452, 8th ed.

² On a *capias* with an *ac etiam* at the suit of an executor, the plaintiff cannot deliver a declaration by the by at the suit of himself personally; but if the writ be a general *clausum fregit*, the plaintiffs may declare by the by, as executor or *qui tenet*, or as assignee of the sheriff. *Hainey v. Sparing*, C. B., E. 10 Geo. 3, Imp. C. P. 288; *Tidd's Pr.* 427, 8th ed.

absolute, when *Baldwin* moved to amend on payment of costs. He afterwards obtained till the following day to look into the authorities, undertaking, if he did not find one, to amend without mentioning the case again. The amendment was to be on payment of costs and of the costs of the application.

On the following day *Baldwin* stated some cases to the Court, particularly *Canning v. Davies*, B. R., E. 9 Geo. 3, 4 Burr. 2417, of which he said he had a fuller MS. note coming up to what Sir James Burrow says in his Index.¹

[*261] **BULLER, J.**—Sir James Burrow probably thought with you when he made his Index, and found reason to alter his opinion before he published. *Baldwin* had leave to amend.

¹ The only point in *Canning v. Davis* was, that where the plaintiff sues out process *qui tam*, and declares in his own name only, it is a fatal variance, and the proceedings will be set aside. In his Index, however, Sir James Burrow states the case thus:—"Variance—between declaration and process: 1st. An executor suing out process as executor may declare in his own right: 2dly. If a plaintiff takes out process to answer to him *qui tam pro rege quam pro seipso sequitur*, he cannot declare in his own name only." There is nothing in the case, as reported, to warrant the former position. However, in *Lloyd qui tam v. Williams*, C. B., M. 11 Geo. 3, 2 Blackst. 722, the same case is referred to in the following terms:—"Where a plaintiff had styled himself *qui tam* in the *latitat*, and declares omitting the *qui tam*, this was held irregular; because by *YATZ*, J., though the plaintiff may style himself executor, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt, for the demand is still the same; but in this case the very nature of the demand is altered, the process importing a demand to the king and the plaintiff, and the declaration a demand to the plaintiff only." But the authority of this dictum was overruled in *Douglas v. Irlam*, B. R., M. 40 Geo. 3, 8 T. R. 416; where the writ having been sued out by the plaintiffs as executors, and the declaration being in their own name, the Court discharged the defendant out of custody on filing common bail: see also *Rogers v. Jenkins*, C. B., H. 39 Geo. 3, 1 B. & P. 383; *Murrell v. Jowett*, M. S., M. 1823; 1 Archb. Pr. K. B. 68, 2d ed.; *Tidd's Pr.* 452, 8th ed.

The KING v. The Inhabitants of LAKENHAM.¹ April 20.

Where an act of parliament directs a rate to be made on the occupiers of land, &c., and on all persons using and having stocks and personal estates, &c., in equal proportion, according to their several and respective values and estates, and it appears that the rate was not made in equal proportion, it will be quashed.

By a private act of parliament in the reign of Queen Anne,² entitled, "An act for erecting a workhouse in the city and county of the city of Norwich, for the better employment and maintaining the poor there," it is enacted, "That it shall be lawful (for certain courts or assemblies of a corporation thereby established) to set down and ascertain, from time to time, what weekly, monthly, or other sum or sums of money shall be needful for the maintenance and employment of the poor in the hospital or hospitals, workhouse or workhouses, &c. (directed to be built), so as such poor of all and every the respective parishes in the said city, and county and liberties of the same, as are unable to work or get their living, be weekly provided for thereout. To the intent that no other levy or assessment of moneys may be made for any other maintenance or allowance to or for any of the poor of the respective parishes, or in any of the towns, liberties, or hamlets within the said city of Norwich and county of the same, or any of the inhabitants;

¹ Private Acts, 10 Anne, c. 6.

² S. C. 1 Bott, 118, 6th Ed. from Wilson's MS.

which said sum and sums of money so set down and ascertained from time to time, and the proportion, part, and share that each parish, town, hamlet, precinct, or liberty in the said city and county and liberties thereof shall, from time to time, raise and pay, the said governor-deputy, governor-assistants, and guardians (of the poor, established by the act) shall, under their common seal, certify unto the mayor and justices of the peace of and for the said city and county for the time being, which said mayor and justices, or any two of them, may and are hereby required to grant and issue out their warrant under their hands and seals, thereby to authorize and require the churchwardens and overseers of the poor, or such person *or persons [*262] as the said guardians shall appoint out of every respective parish, town, hamlet, and precinct in the said city and county or liberties thereof, to rate and assess the said sum and sums of money on the respective inhabitants, and on every parson and vicar, and on all and every the occupiers of lands, houses, tenements, tithes impropriated, appropriation of tithes, and on all persons having and using stocks and personal estates in the said respective parishes, towns, hamlets, or precincts within the said city and county and liberties of the same, or having money out at interest, in equal proportion, as near as may be, according to their several and respective values and estates. [Then a power is given to enforce payment by distress or, for want of distress, by commitment.] Provided always that if any person or persons, parish, precinct, or place, shall find him, her, or themselves to be unequally taxed or assessed, he, she, or they, or such parish, precinct, or place, may appeal to the justices of the peace of the city and county aforesaid at the general quarter sessions of the peace, to be held there, by adjournment or otherwise, next after such assessment made and demanded, who shall and hereby have full power and authority to make such redress and order therein as to them shall seem reasonable."

A rate having been made on the 15th of May, 1783, under this act, for raising the sum of £141 19s. 6d. charged on the hamlet of Lakenham, in the county of the city of Norwich, Francis Selles, one of the assessors and collectors of the poor-rate for that hamlet, on behalf of himself and all other occupiers of lands and houses in the hamlet, appealed against the rate "as unequal and unjust, because the persons having and using stocks and personal estates, and having money out at interest in the several other parishes and hamlets in the said city and county, were not assessed and rated in equal proportions, as near as might be, according to their several and respective values, whereby the said hamlet of Lakenham, and the several occupiers of lands and tenements therein, were much overrated." The rate was under the warrant of two justices, grounded on a certificate, as directed by the statute.

On the hearing of this appeal, the Court of Quarter Sessions confirmed the rate, but stated a special case, which, after setting forth the above clause in the act of parliament, proceeded as follows:

It appeared to this Court, and was admitted by all *parties, that [*263] soon after the passing of the said act, the same was carried into execution, and that from the year 1721 to the year 1731 the supposed personal property in the whole city and county paid one sixth part of the whole sum raised for the maintenance of the poor in the same city and county; that from various remonstrances made to the court of guardians respecting the necessity of a new valuation to be made of all the real estates, and the supposed stock and money at interest and personal estate, that court, in the year 1774, appointed four proper persons to make and return to them an estimate and full yearly rental of the real estates, which was accordingly done, and amounted in the whole city and county to the sum of £16,760, and that court valued the supposed stock and money at interest and personal estate in the whole city and county at £1,600,000. In consequence of these valua-

tions so respectively made, the mode adopted in and through the whole city and county aforesaid for an equal assessment of the real estate was one moiety of the rack rent, and of the supposed stock and personal estate, or money out at interest, one-fortieth part of the interest thereof at four pounds per cent., from the great difficulty of ascertaining with any degree of precision the real quantity thereof. In pursuance of this mode of assessment the rates have uniformly been made from the year 1774 to the time of making the rate in question; and at the making of the rate in question, the corporation of guardians of the poor in the said city and county upon the rentals of real estates in the whole city and county, amounting to £43,480, assessed one moiety or half part, namely £21,750, and upon the supposed personal property in the whole city and county, amounting to £1,269,500, assessed one-fortieth part of the interest thereof at and after the rate of four pounds per cent.; by which mode of assessment the supposed real estates contributed and paid towards a quarterly rate of £2,298 the sum of £2,171, and the supposed personal estates the sum of £127. And it further appeared that the case for the hamlet of Lakenham was the proportion of the aforesaid sum of £2,298, according to the above mode of assessing real estates, and that at present in the said hamlet of Lakenham there is no personal estate: and thereupon it was moved by the counsel for the appellant, that the said rate, so as aforesaid assessed, be quashed; but this court, upon due consideration [264] of the premises, and it having *from them appeared, in their opinion, that the mode adopted for the assessment of all the real estates within the said city and county is an equal mode of assessment, and that respecting the supposed stock and personal estates, or money out at interest, although one-fortieth part of the interest thereof is only assessed, yet such mode of assessment contained a relative equality, as the exact quantum of the whole thereof cannot in its nature be ascertained, and more especially such part as is used in trade. Confirmed the rate."

This case having been removed by *certiorari*, and a rule obtained to show cause why the order confirming the rate should not be quashed, the case was argued last Michaelmas term by *Beacroft, Th. Couper, Partridge and Harvey*, in support of the order, and *Lee and Mingay* against it.

In support of the order it was urged, that the equality or inequality of a rate is a question of fact, which the justices in sessions solely were to decide; and in this case the justices had decided that the rate was equal. The general point as to the ratability of personal property did not arise here; but although by the private act of parliament, under which this rate was made, personal estate is expressly directed to be rated, still the difficulty of ascertaining the amount of that sort of property is so great, that unless some sort of conjectural line like what seems to have been followed in this case is adopted, it will be impossible to comply with that part of the act. A lawyer will then be driven to give the same opinion as to Norwich as has often been given with respect to personal property under the general law, viz., "that by law you may rate, but in fact it is impossible." It may be said, that although the justices have the sole jurisdiction as to the fact of the equality of a rate, yet if it appear on the face of the case that they have drawn a wrong conclusion of fact from the premises, the Court may correct it. That may be true; but then the conclusion must self-evidently, necessarily, and unavoidably appear to be wrong; 4 Burr. 2493. It will not be enough that it is probably so. The respondents do not maintain so absurd a position as that one-fortieth of the income arising from personal property is proportionate to one-half of the rent of real property. The case states that the sum on which the interest is calculated is the amount of the supposed stock, money at interest,

and personal estate. *That part of a man's personal property which is visible in the place for which the rate is made is the only proper [*265] subject of rating. In *R. v. Brogsave*, M. 10, Geo. 3, 4 Burr. 2491, Lord MANSFIELD said he thought it right and proper that there should be a difference between lands and houses, because there are several charges incident to houses which lessen their value, and which do not fall upon lands; *Ibid.* 2498. But vide *Rex v. Swanness*, H. 21, Geo. 3, 1 Dougl. p. 562. So with regard to the stock in a manufacturing town like Norwich there may be many charges to be deducted. The manufacturer may not have paid for his yarn, though computed as part of his supposed property. He may owe the workmen who have been employed in weaving, dressing, and preparing the different articles of his trade. In short it is impossible to ascertain precisely the clear value and amount of personal estate as you may in the case of land, and the Court cannot say that this rate appears manifestly to be unequal; *Burr. loc. cit.* 2494. In *Rex v. Hardy*, E. 17 Geo. 3, Cowp. 579, which was a case upon this very act of parliament, the same mode of rating had been adopted, and the Court, after solemn argument, confirmed the rate. About a year and a half after *Rex v. Hardy*, another case of *Rex v. Eaton*, exactly similar to the present, was removed into this court, but was, on consideration, abandoned by the counsel.

On the other side, it was said, that the Court had avoided giving any decisive opinion on the ratability of personal estate under the statute of 43 Eliz., but that the reasons for so doing could not influence in this case, because the express words of the act now in question require the taxation of that sort of property, and that it shall be taxed in *equal proportion*, as near as may be with the land. The act of parliament says nothing of *relative equality*. The inference the justices draw from their own *data* is not only possibly but certainly and manifestly wrong. The parties who have decided upon this rate are the rich moneyed men of the place, who wish to exonerate their own fortunes and throw the burden of the poor on the houses and real property; whereas, from the express words relative to personal estate, it is clear that the legislature meant that the chief burden should fall on the opulent possessors of stock in trade and money at interest; and the ratability of such money at interest is not *confined, as has been contended on the other side, to what is visible or lent out in the particular hamlet [*266] or parish where the person rated for it resides. Great reliance is had on the word *supposed*; but there is no reason why the amount of the personal property should not be ascertained; and, in fact, whoever will swear that he has no personal property after his debts are deducted is put out of the rate. As to the case of *Rex v. Hardy*, it will on comparison be found to differ from the present.

Lord MANSFIELD.—Let the case stand over to see whether the parties can not agree among themselves, without having the opinion of the Court. I doubt whether this is parallel to the former case.

This day *Bearcroft* informed the Court that the parties had not been able to come to any compromise.

Lord MANSFIELD.—The rate cannot be supported.

The order of sessions quashed.¹

¹ See *Rex v. Hull Dock Company*, B. R., M. 5 Geo. 4, 3 B. & C. 516.

LAND v. LORD NORTH and the Governor and Company of the BANK OF ENGLAND. April 22.

Enemy's goods coming into this country may be seized for the use of the crown. In detinue, the plaintiff must show a right to have the goods delivered to him. One

of several defendants may pray that the plaintiff and the other defendants shall interplead.

THIS was an action of detinue, and the substance of the record was as follows :

The declaration stated, that the plaintiff at London, to wit, in the parish of St. Mary-le-Bow, in the ward of Cheap, was possessed of certain casks and bags containing certain pieces of Dutch silver coins called ducatoons, and specifying the number and marks of the casks, the number of bags in each cask, and of pieces in each bag, with their respective value in the money of this country; that he lost them out of his possession; that they came by finding to the hands of the Governor and Company of the Bank of England and Lord North, the defendants, and still were in their hands, whereby an action had accrued to the plaintiff to demand and have the said casks, bags, and pieces of silver coin of them, but they refused to deliver, and unjustly detained them.

[*267] *Lord North pleaded *non detinet*; and the Governor and Company of the Bank, that the goods and chattels in the declaration mentioned were delivered to them and deposited and left in their hands and custody by the plaintiff and Lord North, and with their consent, under certain conditions, to be safely and securely kept, and to the plaintiff Lord North under those conditions, to be delivered; but that whether the said conditions had been performed and completed on the part of the plaintiff, or on the part of Lord North, or not, the said Governor and Company were wholly ignorant: and that the said goods and chattels were too bulky and heavy to be brought into court, otherwise they would have brought them into court; but that they were, and from the time of the delivery to them had been ready to deliver them to the plaintiff or Lord North, whichever of them was entitled to the same, and that they then were ready to deliver them to any person or persons to whom the Court should award the same; and they prayed that the plaintiff and Lord North might interplead between themselves concerning the delivery of the said goods and chattels, and their right to the same.

The plaintiff upon this, stated that forasmuch as *he could not deny* the said several pleas, *he would not further prosecute* Lord North for the detention, and therefore he was *acquitted* thereof; and forasmuch as the Governor and Company of the Bank were ready to deliver the goods to any person or persons to whom the Court should award the same, and prayed that the plaintiff and Lord North should interplead, it was *considered* that the said plaintiff and the said Lord North present then in court should so interplead.

The plaintiff then, by a *declaration of interpleader*, demanded the said goods against Lord North, and set forth that the goods to him and not to Lord North belonged to be delivered, because before the delivery of them to the Governor and Company of the Bank for safe custody he was a master and commander of a Prussian ship called Ooster Eems, then bound on a voyage from Amsterdam to the Cape of Good Hope and places beyond the said cape: that as such master and commander he was lawfully possessed of the goods in question, being goods loaded on board his ship, to be conveyed therein by him for the said voyage; and that while the ship, with the goods on board, [*268] was proceeding *on her voyage, she was wrecked and stranded on the high seas on the 21st of January, 1783, in a place called Goodwin Sands, lying off the coast of the county of Kent, by storm; that thereupon, for the necessary preservation of the said goods, he removed and caused them to be removed out of the ship to the town of Deal, in the said county, and there deposited and kept them in his lodgings and custody until Lord North, pretending title to them as Lord Warden of the Cinque Ports, caused them to be seized, alleging that he would cause a suit to be instituted in the Court

of Admiralty for the condemnation thereof; that the plaintiff, upon such allegations, believing that the Court of Admiralty had a jurisdiction to condemn or restore the said goods, did, together with the said Lord North, deposit and leave them in the hands and custody of the Governor and Company of the Bank, to be safely kept until the property should be determined by the said Court of Admiralty, either for the restitution or condemnation; but that inasmuch as the said Court had not any jurisdiction in or over the said goods, the same ought to be delivered to him. He therefore prayed judgment, and that the goods might be delivered to him.

To this declaration of interpleader Lord North pleaded, 1. That at the time when the goods were removed out of the ship, and about the time of the said seizure, there was open war between our lord the king and the subjects of the States General of the United Provinces of Holland, to wit, at London aforesaid, &c., and that the said goods then were the property of certain subjects of the said States General. 2. (after alleging the war, &c., as in the first plea) That the goods were the property of certain subjects of the States General, and also that the ship was so—without this, that she was a Prussian ship. 3. That the plaintiff, after the depositing and leaving of the goods in the hands and custody of the Governor and Company of the Bank, viz., on the 4th of July, 1783, exhibited his claim in the high Court of Admiralty, and that such proceedings were thereupon had; that afterwards, viz., on the 22d of July, 1783, the judge, by an interlocutory decree, pronounced, “that the goods claimed were not at the time of the seizure thereof within a privileged vehicle, or in a neutral territory,” and condemned the same generally, reserving the question of right between his majesty in his office of admiralty, and the said Lord North, Warden of the Cinque Ports; that afterwards the plaintiff appealed *from this decree to the lords commissioners of appeals in prize causes, and that the said appeal was still [*269] pending and undetermined. 4. That before the removal from the ship and the seizure of the goods, viz., on the 17th of June, 1778, the king, by his letters patent, granted to Lord North during pleasure, the office of Constable of the Castle of Dover, with the appurtenances; and also the office of Warden and keeper of the Cinque Ports and their members; and also the office of Admiralty within the Cinque Ports and their members; and also all wrecks of the sea, jetzon, flotsam, and ligan goods, merchandises, and effects whatsoever, which at any time during the continuance of the letters patent should be cast away, *wrecked*, or lost, or which should be taken up, gotten, or recovered by him, his deputies, or agents, in any places, ports, or creeks, as well by land as water, within the precincts of the said castle or the liberties thereof, or within the precincts, liberties or limits of the said Cinque Ports, or any or either of them, *without any account* or any other thing to our said lord the king, his heirs or successors, to be paid or made for the same, in as ample manner as the late Earl of Holderness or any other person theretofore had or exercised the said offices and premises: that the said letters patent at the time of the seizure and still were of full force: that afterwards, viz., on the 21st of January, 1783, the goods so removed from out of the said ship so wrecked and stranded as aforesaid were brought within the precincts, limits, and liberties of the Cinque Ports, viz., at Deal, in the county of Kent. Then the plea goes on to allege the war with Holland at the time of bringing the goods within the said limits and of the seizure, the property of the goods and of the ship in Dutch subjects, and that by reason of the said premises the said goods became and were forfeited to Lord North by virtue of the said letters patent, and that he thereupon seized them at Deal, within the said limits, as belonging to him by virtue of the said letters patent, as he lawfully might do for the cause aforesaid.

The plaintiff *demurred generally* to the *first, second, and fourth* pleas. To the *third* he *replied*, confessing the suit in the Court of Admiralty, the interlocutory decree there, and the appeal, in the words in which they were pleaded—that afterwards, viz., on the 14th of July, 1784, the appeal was heard, and the lords commissioners of appeal thereupon adjudged, decreed, [*270] and pronounced, “That the said *high Court of Admiralty had no jurisdiction over the said goods,” and reversed the decree appealed from for want of jurisdiction.

Lord North *demurred generally* to that replication.

Wood, for the plaintiff Land.—He contended that Land had good title as against Lord North—that it is immaterial as between these parties whether the goods were forfeited to the crown or not: that question would come in litigation upon an information. The single question here is, which of these two parties, Land, the plaintiff, or Lord North, the defendant, is entitled to a delivery of the goods. The nature of an interpleader is, that if the plaintiff can show a title, the Court are to decide whether his or the defendant's is the best, without regard to any other person not before the Court.

The Bank claim no title, therefore it cannot be in any case a consequence that the Bank may keep them. Had the action been brought merely against the Bank, they must have pleaded the same plea they have done; and then a *sci. fa.* must have issued to have brought in Lord North, to show what title he has. The true question is, which of these parties has the *best* title. The ancient practice in cases of this kind was for the two contending parties to bring each his action against the stake-holder; which was inconvenient; and to prevent his being harassed with a multiplicity of suits, this practice of interpleading was introduced, and such stake-holder is called the garnishee. The Court cannot decide on the title of the crown, because the crown is not before the Court; and as to the two titles which are upon the record, the plaintiff has the prior possession, in the light of a common carrier, and this is such a title as is sufficient against all others who do not claim by a better; and it does not appear that the plaintiff was an enemy, therefore there is no personal disability in him, to sue in the courts of law here.

As to Lord North's title, his first plea is, that there was open war between England and Holland, and that these were enemies' goods; but this is no title in a subject: it may be one in the crown; but it is not the question, whether the crown has or has not a better title than either of the contending parties. He does not pray that the goods may be delivered to him. In all cases the garnishee in the interpleader claims delivery as well as the other [*271] party. Lord *North does not in this plea state any authority from the crown to seize, either to his own use or for the use of the crown; and it is a clear point that a subject cannot seize the goods of an enemy to his use, but for the benefit of the crown, unless there be a grant of them.

The second plea stands on the same ground.

The third plea rests on the sentence of the Court of Admiralty. But the commissioners for prizes have reversed the sentence upon the ground of the Court of Admiralty not having any jurisdiction.¹

The fourth plea states, that as Lord Warden of the Cinque Ports he is entitled to the goods as a forfeiture to himself; but there is nothing in the grant of that office to Lord North of enemies' property, but of wrecks only. Now these goods were not wrecked, because they were brought from the ship by the person who had the custody of them, and deposited within the precincts of the Cinque Ports. It is not alleged that this is a perquisite of

¹ See *ante*, vol. ii. p. 618 (n).

the lord warden's, but as being enemies' property. If there had been any sequestration, he ought to have alleged it in his plea, and that his predecessor had such a right. The goods being in the possession of Land, what ground of right was there for Lord North taking them out of his possession? for he might as well have retained them for the use of the king as Lord North.

Gibbs, for Lord North.—He admitted that Lord North must show a better title than the plaintiff; but that was not the only question, for the plaintiff must show a positive title in himself at the time this action was brought. Now from the plaintiff's own showing, he had no color of title at that time. The goods were delivered to the Bank, to be redelivered according to the judgment in the Court of Admiralty; pending which sentence this action was brought, and the judgment there was that the plaintiff had no title.

This fact Lord North has pleaded in his third plea; and the plaintiff has replied, that the Court of Admiralty has no jurisdiction; but the ground of this replication, namely, the judgment of the commissioners for prizes, did not exist till after plea pleaded.

The averment in the declaration of interpleader, that the *Admiralty had no jurisdiction, is immaterial, not being traversable. The [*272] plaintiff must show, either, that by the sentence in the Admiralty he had property, or that by the sentence of the commissioners for prizes, the Admiralty had no jurisdiction. Admitting that the plaintiff may avail himself of the sentence of the commissioners of prizes, he then must claim to have delivery. He states himself to be the master of a Dutch ship, and possessed of the goods for carriage, and that he brought them for safety to Deal: the utmost that this gives is a bare possessory right. But at that very time there was open war between England and Holland; and then it follows that the plaintiff is possessed of enemies' goods. Subjects, by the law of nations, have a right to seize the goods of an enemy.

Grotius, book 3, c. 6, s. 12. "But things movable, whether with or without life, are either taken in public service or out of it: if they are not taken in public service, they are the private captor's." *Bro. tit. Propertie*, 38.

The title of the plaintiff was the title of the owners, and until divested out of him the king's title could not arise. Lord North shows a better title than the plaintiff, because he seizes in right of the king, and the plaintiff's property is divested by the seizure, and at that moment Lord North's commenced.

Upon the fourth plea, Lord North has an absolute title against all the world. If they could not belong to Lord North as first occupant, they clearly belong to the crown; and the general words of the patent are large enough to comprise this: they are "goods and merchandises whatever lost or got." They come within the terms of the grant, being goods brought by plaintiff himself within the precincts of the Cinque Ports, and got by Lord North by the seizure of his agent.¹

Wood, in reply.—The crown not being upon the record, the Court cannot give judgment for it; and neither the king nor Lord North claiming title, the Court cannot give judgment for either.

*["At this^a moment the whole court, which happened to be very much crowded, became an entire scene of confusion, every one rising"] [*273]

¹ It appears that three eminent civilians gave an opinion in this case, that if the ship was to be considered a droit of admiralty, it did not pass to the lord warden by his grant, there being no mention therein of prizes and captures either by sea or land within the jurisdiction of the Cinque Ports. See Brown's Civil and Admiralty Law, vol. ii. p. 499.

^a The accident here related is given in the MSS. as an extract, probably from some

at an instant, and looking upwards. Terror was strongly expressed in every man's countenance. Mr. Justice Willes got out by the private door on his side of the court. Lord Mansfield, Mr. Justice Ashurst, and Mr. Justice Buller left the court with great precipitation by the usual entrance, and retired into the lord chancellor's private room. The Bar, the bystanders, all present to the number of, near two hundred (except about eight or ten) rushed out of court with the utmost precipitation. The barristers pressed towards the curtain, which being down very much impeded their escape. Entangled with this and their gowns, the greatest part of them fell, with those from other parts of the court, one over another on the steps into the hall. Some thought the roof had given way, some that there was an earthquake—all ignorant of the real cause.

"The panic, however, was as short as it was ridiculous: in a few minutes as many as could returned, and in about a quarter of an hour the court was resumed, without any one having received material injury.

"Lord Mansfield then addressing himself to Mr. Wood and the Bar in general, told them, if they had any wits left, they might go on.

"A maid-servant belonging to an officer of the House of Commons accidentally threw a little dirty water on the skylight of the court, and a few drops coming through an aperture and falling on the heads of two or three caused all this strange confusion.

"An instance this not much to the honor of human abilities. That men possessing the strongest mental powers, accustomed to a quick application of them, and at the moment this happened in the very exercise of them, should be unable to apply the smallest degree of reflection, which in this case would have been fully sufficient to have prevented the consequences, is truly unaccountable."

* Wood having resumed his argument in reply, concluded with proposing a second argument.

Lord MANSFIELD.—If we had any doubt, we would order the question to be argued again; but we have no doubt, and the value of the property alone is no reason for a second argument. The facts are these:—The plaintiff was the master of a Prussian ship, on board of which were goods the property of enemies. The goods are brought on shore and seized in right of the crown; for if Lord North has any right, it is in right of the crown, and under the grant of the crown. The money is placed in the Bank to be there kept as a deposit till the true owner appears. Lord North prays no delivery, and is willing that the money should continue in the Bank till the question between him and the owner is determined. The only question on the pleadings is, whether the Court shall order the money to be delivered to the plaintiff; the question is not which of the parties has the better title. In order to warrant a judgment for the plaintiff, it must appear that he has a right; but in fact he has none. He claims on behalf of an enemy, which he cannot do against the crown. If the property appears to be in the crown, it becomes a case of generosity whether the crown will take advantage of that *summum jus* which undoubtedly gives all enemies' property coming into this kingdom to the king, or whether in this, a case of calamity, it shall be restored to the owner. The goods therefore ought not to be delivered to the plaintiff.

WILLES, Justice, and ASHURST, Justice, concurred.

BULLER, Justice.—It is impossible for the Court to give judgment for the

of the publications of the day. It is not unlikely that the dreadful accident which occurred at Worcester in the year 1757, when the roof of the court fell in during the trial of a cause before Mr. Justice WILMOT, might have caused the panic at Westminster. At Worcester several persons were killed. See the Life of Sir Eardley Wilmot.

plaintiff without his making out a title; for the question is not who is finally entitled, but who is entitled on this record. Judgment against plaintiff.

The Court observed, that they would not say how judgment should be entered. The defendant must take care and enter it properly.

*BIRD v. GUNSTON, Knight.¹ April 22.

[*275]

A magistrate who means to act in the execution of his office is entitled to notice under the stat. 24 G. 2, c. 44, § 1.

ACTION of trespass for taking and detaining a cart and horses of the plaintiff, together with certain casks of porter and brandy. The defendant pleaded not guilty, and the cause was tried at the last assizes for Somersetshire, where a case was reserved which stated—

That the plaintiff's wagon, with two horses thereto, was in the turnpike-road at the time the defendant stopped them; but the wagon was then standing still, and the waggoner was fastening the casks contained in the wagon. The defendant, who was a justice of the peace, stopped the wagon and horses with intent to convict the driver of the wagon in the penalty of £10, under the statute of 13 Geo. 3, c. 78, § 61, and the wagon and horses were detained till the next day. No notice was given to the defendant previous to the time of bringing the action, 24 Geo. 2, c. 44, § 1.

The question was, whether the action could be maintained.

Gibbs contended, on the part of the plaintiff, that notice was not necessary in this case, for that the act done by the defendant was not in the execution of his office as a justice of the peace: that the plaintiff was not riding upon the wagon, nor the wagon in motion, and therefore the case was neither within the words nor the meaning of the statute of 13 Geo. 3.

Lord MANSFIELD.—When the justice thinks he is acting, and means to act, in the execution of his office, it is sufficient, otherwise the protection held out by the statute of Geo. 2 would be nugatory. A man wants no protection when his conduct is strictly right. The intention of the month's notice was to enable magistrates to tender amends when they find they have made a mistake. Here the defendant thought himself authorized by the act of parliament.

Judgment for the defendant.²

¹ 2 Chitty's Rep. 459; S. C. cited 6 B. & C. 354.

² The principle of this case has been repeatedly recognised. "It has been frequently observed by the Courts, that the notice which is directed to be given to justices and other officers *before actions are brought against them is of no use to them when they have acted within the strict line of their duty, and was [*276] only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it."—Per Lord KENYON, *Greenway v. Hurd*, 4 T. R. 555. So where a justice of the peace entered a house, and took away a gun, though not authorized so to do, yet, as he had acted as a justice, it was held that he was entitled to notice; *Briggs v. Evelyn*, 2 H. B. 114. So a magistrate who commits the mother of a bastard child, though two magistrates only have jurisdiction; *Wheller v. Toke*, 9 East, 364. So where a magistrate has authority to act upon the subject-matter of the complaint brought before him, he must be considered to have acted by virtue of his office, though the place where the offence was committed was not within his jurisdiction; *Prestige v. Woodman*, 1 B. & C. 12. The rule on this subject is thus laid down by Mr. Justice BAYLEY:—"If a magistrate act in a case which his general character authorizes him to do, the mere excess of authority does not deprive him of that protection which is conferred on those who act in execution of it; but where there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to the protection." *Cook v. Leonard*, B. R., H. 7 & 8 Geo. 4, 6 B. & C. 354; see also *Graves v. Arnold*, 3 Camp.

242; *Theobald v. Archmore*, B. R., H. 58 Geo. 3 1 B. & A. 227; *Waterhouse v. Keen*, D. R., E. 6 Geo. 4, 4 B. & C. 200.

But where the act in question has not been done in the capacity of justice, and cannot be referred to that character, but is wholly *diversa intuitu*, notice is not required. Thus where a justice of the peace, who was also mayor of a borough, received a fee for granting a license to a publican, it was held that such fee could not have been taken by him in his character of justice, and that he was not entitled to notice. *Morgan v. Palmer*, B. R., E. 5 Geo. 4, 2 B. & C. 729; see also *Umpheby v. Maclean*, B. R., M. 58 Geo. 3, 1 B. & A. 42; *Lawton v. Miller*, B. R., E. 1818, cited 6 B. & C. 355; *Irving v. Wilson*, B. R., M. 32 Geo. 3, 4 T. R. 485.

LONG and Others v. ALLAN.¹ April 22.

In an action on a policy of a ship warranted to depart with convoy, if the ship sails without convoy, the assured is entitled to recover the premium. A usage in such case to return the premium, deducting a half per cent., is good.

THIS was an action against an underwriter on a policy of insurance. The first count in the declaration stated, that the plaintiffs had made an insurance [*277] on the 24th of August, *1782, upon goods on board a ship called the *Jamaica*, "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August:" that the defendant underwrote £400 on that policy at that premium: that on the 31st of July, 1782, the ship sailed from Jamaica for London, but without any convoy for the voyage, whereby the policy became void; by reason whereof the defendant became liable to pay to the plaintiffs £50 8s., being the premium he received for the said insurance. There were other counts for money paid and money had and received. The defendant pleaded *non assumpsit*.

The trial of the cause came on before the Earl of MANSFIELD at Guildhall, at the sittings after last term, when a verdict was found for the plaintiffs with £48 8s. damages, subject to the opinion of the Court on a case which stated that the defendant underwrote the policy as stated in the declaration; that the ship sailed from Jamaica for London without convoy on the 31st of July, 1782; and that the jury found the *constant usage* to be, that in insurances at and from Jamaica to London, warranted to depart with convoy, or to sail on or before the first of August, where the ship does not depart with convoy, or sails after the first of August, to return the premium, deducting a half per cent.

Baldwin, for the plaintiff.—This is a stronger case than any that has yet been determined. Here the jury have found that it has been customary to return the premium, deducting a part. The reason of the case also is strong in favor of the plaintiffs. *Stevenson v. Snow*, B. R., M. 2 Geo. 3, 3 Burr. 1237; 1 Blackst. 315, 318, is in point, and there no usage was found.* When the party runs no risk, he ought not in conscience to retain the premium. *Bond v. Nutt*, B. R., E. 17 Geo. 3, Cowp. 601; ante, vol. i. p. 367 (n). See Park. Ins. 530, 6th ed.

Grant, contra.—This is a question on the construction of the policy, and no usage should have been gone into. *Loraine v. Tomlinson*, B. R., H. 21 [*278] Geo. 3, ante, vol. ii. p. 585. The only question is, whether *this is an entire risk or two different risks. If the usage were to govern, there might be two different determinations on two policies containing exactly the same words. The insurer takes the combined risk—the dangerous and

¹ S. C. Park. Ins. 529, 6th ed.

² The usage found was to return a *part* of the premium, without ascertaining what part. Lord MANSFIELD said he did not go on the usage.

the less dangerous portion of the voyage. When the risk has once commenced, it cannot be defeated by a subsequent event. Emerigon.

LORD MANSFIELD.—The law is clear that where the risk has never commenced the premium shall be returned. Where it has not been so held, different stages of the voyage could not be made. The inclination of my opinion has been on principle, that where, in a certain event, the risk shall not be run, there ought to be a return of premium. But where there is a usage it makes it clear, as it must then be understood to be engrafted on the policy.

WILLES and ASHURST, Justices.—Same opinion.

BULLER, Justice.—The only question is whether parol evidence was receivable. If it was, it is in this case decisive. In *Bond v. Gonzalez*, Coram HOLT, 2 Salk. 445, Lord HOLT admitted such parol evidence. You may receive evidence to explain or control the policy.¹ In *Meyer v. Gregson*, ante, vol. iii. p. 402, no usage was proved.

Judgment for the plaintiff.²

¹ Mr. Justice BULLER must be understood to mean parol evidence of the usage of trade; see *Weston v. Emes*, C. B., 48 Geo. 3, 1 Taunt. 117.

² See ante, vol. ii. p. 790 (n).

M'ILREATH v. MARGETSON. April 22.

A. and *B.* being joint prize agents, *A.* is imposed on by persons falsely pretending to be sailors, to whom he pays a sum of money, which he is subsequently compelled to pay again to the persons really entitled. *B.* is not bound to contribute to the sum so paid.

ASSUMPSIT for money had and received, and, on an account stated, tried before Lord MANSFIELD at Guildhall, at the sittings after last term, and a verdict found for the plaintiff with £78 2s. 2d., subject to the opinion of the Court on the following case.

The plaintiff and the defendant were appointed by the captain, officers, and crew of his majesty's ship, the *Porto*, joint agents of a Dutch ship called the *Palm-Boom*, which *had been captured by the *Porto*, for the shares [*279] belonging to the officers and crew. The defendant conducted the whole of the business respecting the sale of the prize, and paying the prize-money, and he had paid the agent appointed by the admiral his eighth of the agency, amounting to £97 6s. 8d. The plaintiffs share of the agency amounted to £840 12s. 2d. The defendant had paid £262 10s. Sundry persons who personated sailors imposed upon the defendant, and received from him shares of prize-money due to sailors to the amount of £385 2s., which he had been obliged to repay to the sailors actually entitled.

The question stated was, whether the plaintiff was liable to contribute his proportion to the sum of £385 2s. which the defendant had so paid. If the Court should be of opinion that he was liable to contribute, a verdict to be entered for the defendant, otherwise the verdict for the plaintiff to stand.

Park, for the plaintiff, cited 16 Geo. 3, c. 5, but was stopped by the Court.

Shepherd, for defendant.—The prize-act makes no difference in this case. These parties are joint agents; they are two persons executing one office. *Willett v. Chambers*, B. R., 18 Geo. 3, Cowp. 814. See also *Stone v. Marsh*, B. R., 8 Geo. 4, 6 B. & C. 551. The defendant was imposed on by a felony, and the loss did not arise by his own fraud or negligence.

LORD MANSFIELD.—The defendant has been guilty of negligence, and as

between him and the plaintiff the latter is not liable. It is of great consequence to the public that the rule should be strictly preserved. With regard to third persons, the plaintiff and the defendant are *both* liable.

Judgment for the plaintiff.¹

¹ So where a banker pays a check which has been illegally altered to a larger amount, he cannot charge his customer for anything beyond the original amount; *Hall v. Fuller*, B. R., T 7 Geo. 4, 5 B. & C. 750; unless in the manner of drawing the check the customer has himself been guilty of negligence. *Young v. Grote*, C. B., T. 8 Geo. 4, 4 Bingh. 257.

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*PAUL v. EDEN and Another.¹ April 22.

A seaman enters on board a privateer under an agreement to receive prize-money in place of wages, and that unless he continue on board six months, he shall forfeit his right to prize-money. During the six months he is impressed on board a king's ship; and after being impressed, entered on board that ship and received bounty. Held that this was no forfeiture of the prize-money to which he had become entitled during his service on board the privateer.

THIS was an action for prize-money due to the plaintiff as a seaman on board a vessel called the *Enterprise*, of which the defendants were owners, and for money had and received by them to the use of the plaintiff. The defendants pleaded the general issue; and the trial of the cause coming on at Guildhall, before the Earl of MANSFIELD, at the sittings after last term, the jury found for the plaintiff, with £7 17s. 6d. damages, subject to the opinion of the Court on the following case.

The plaintiff entered on board the *Enterprise* privateer, of which the defendants were part owners, for a cruise of six months in the capacity of a seaman, and executed the articles of agreement for the cruise, dated the 11th of October, 1778, in which are contained the following clauses:—

"Imprimis, It is agreed upon, expressed, and declared, that the said captain, officers, and seamen, and others executing these presents, shall go and serve on board the said privateer without any wages or salary, but in lieu and stead thereof, shall be entitled to the respective shares and proportions of all and every such prize and prizes as shall be taken by them, and also of such bounty-money, in such manner as is mentioned, set forth, and expressed in the schedule hereunto annexed.

"Secondly, That the said privateer shall be employed in a cruise against his majesty's enemies for the space of six months, to commence from her departure from the Downs, and until the said ship shall be arrived back again to the said port of London, in case the said letters of mart or commission, or any other commission of war to be granted in lieu thereof, shall so long continue in force.

"Eleventhly, That all and every person and persons serving on board the said privateer shall continue on board the same for the space of six months, and be full six months at sea (any time lying in harbor not to be included), [*281] from their departure from the Downs, if thereto required, until the ship's arrival back again to the port of London; during which time they shall respectively perform the several duties which their respective stations shall require, on pain of forfeiting their share of all prizes and bounty-money whatever.

"Thirteenthly, That such forfeiture shall be divided among the foremast-men, land-men, and boys only, according to their respective shares."

¹ S. C. shortly stated, Abbott on Shipping, 444, 5th ed.

About the latter end of October, 1778, the *Enterprise* sailed upon her intended cruise, and arrived at Plymouth in the month of February, 1779. Upon her coming into that harbor, the seamen in general were cautioned not to enter, in case they should be impressed. On the 28th of February, 1779, the plaintiff, while on duty, was impressed and put on board the *Milford* in his majesty's service, and continued on board the said ship; and on the 9th of March following entered on board the said ship, and received the usual bounty. Whilst the plaintiff was on board the privateer she took a prize called *Les Deux Sœurs*, which produced £10 per share, and plaintiff, as a seaman, was entitled to one share. The defendants have advanced and paid on the plaintiff's account the sum of £2 2s. 6d. An order was obtained from the Admiralty for the plaintiff's discharge; and he was not restored to the privateer on account of his having entered on board the *Milford*.

Baldwin, for the plaintiff.—This case has been determined in another case in the Common Pleas, in which it was held that the plaintiff was entitled to recover. *Price v. Eden*.¹ In time of war the king has a right to the service *of every seaman, and the owners of merchantmen or privateers cannot compel any person to enter into a contract not to serve the public. Stat. 2 Geo. 2, c. 36; 2 Geo. 3, c. 31. By the first-mentioned statute, no seaman on board a merchant ship shall forfeit wages by entering on board a king's ship. A privateer does not differ from a merchant ship, and the prize-money is substituted in lieu of wages. If the plaintiff had continued as an impressed man, it is not disputed that he would have been entitled. By his being impressed, and remaining so nine days, his contract was at an end, and he became *sui juris*, and had a right to enter.

Lee, contra, admitted that the case had been so decided in the Common Pleas; but the parties were not satisfied, and determined to bring it before this Court. The act of parliament does not seem to include this case, and

¹ The following note of Lord LOUGHBOROUGH's judgment in *Price v. Eden* is from the note-book of Mr. Justice BULLER.

"The proviso is not confined to time of war. In this case the defendants contend that the plaintiff must forfeit the prize-money he has once earned. Let us see how this case can be supported. The articles express that there are to be no wages, but to take the chance of the voyage, and the recompense is to be the eventual benefit of the prizes that might be taken.

"The clause, that if the sailors shall not continue on board such a time they shall forfeit their wages, is usually inserted in all articles. This man, after the prize is taken (by no act of his own), is impressed. He afterwards enters on board the man-of-war, and takes the bounty-money. There is a caution given him not to enter, and the consequence is, that the order of the Admiralty restoring the man to the privateer did not apply to him.

"It is contended that the plaintiff's entering after he was impressed, being an act of his own, is a forfeiture. On the other side it is urged that the 2 Geo. 3, c. 31, exempts the wages from forfeiture if the man enters on board of any of his majesty's ships. This clause is not confined to time. By law the king had a right to have the service of every seaman, which right no agreement can take away.

"They contend that a privateer does not come within the description of the act, which speaks of merchant ships only. I can see no difference. The merchant service extends to all service except the king's. Privateers have written articles, and are bound to have them, as well as merchantmen; and if they were to sail without articles, they would be liable to the penalty in the prior clauses of the act, the latter clause therefore must be as extensive in its power as the former. So is the purview of the act.

"If there is therefore a doubt concerning the man's coming within the words and meaning of the act, speaking of merchant ships, the act being to deprive a man by forfeiture of what he has once earned, the Court will lean against the doubt, in his favor. I cannot distinguish the prize-money from wages.

"Mr. Justice GOULD of the same opinion.

"Mr. Justice HEATH of the same opinion."

there is plain reason why it should not. The act is "for the better regulation of seamen in the merchant-service" bound on voyages beyond the sea. It says nothing of cruising. It provides that no master of a ship bound beyond seas shall carry any seaman or mariner without first coming to an agreement for their wages under a penalty of £5. Here the articles expressly say that they shall have no wages; and if privateers are within the statute of Geo. 2, the captain must be liable to the penalty. In a case of *Baker v. Jordan*, decided last year, it was held that privateers were not within the act. The plaintiff has agreed by the 11th article that he will continue on board six months; and supposing the act never to have been passed, he clearly would have forfeited his wages.

The Court having taken time to consider, on this day

Lord MANSFIELD delivered the judgment of the Court.—The question turns on the 11th article of the agreement, which provides that every sailor shall continue on board six months, under pain of forfeiting his share of the prize. [His lordship then stated the facts of the case.] The question is, whether by this absence the plaintiff has forfeited his share of the prize-money. It having been argued on the statutes 2 Geo. 2 and 2 Geo. 3, and the case decided in the Common Pleas having been mentioned, we took time to consider. We have some doubt whether the case comes within the statute, but we are most clear that if the act had never been made this was not a forfeiture. The prize having been taken, the plaintiff acquired a vested right, which he might forfeit by not continuing on board. But to make an act of forfeiture the will must concur. Here he was taken by inevitable necessity, and it is the same as if he had been very ill (see *Chandler v. Grieves*, C. B., H. 32 Geo. 3, 2 H. Bl. 606 (n), and *Abbott on Shipping*, 442, 5th ed.), or washed overboard. His entry was many days afterwards; and if he had not entered, he would have been carried abroad in the man-of-war. It was motive of bounty and favor to let him enter.

Judgment for the plaintiff.

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NEWBY v. WILTSHIRE.¹ April 22.

A master is not liable to the overseers of a parish who have been compelled to pay the amount of a surgeon's bill for curing his servant, in consequence of an accident happening to him in the parish.

At the trial of this cause (which was an action on the case) at the last assizes for the county of Cambridge, before ASHURST, Justice, a verdict was found for the plaintiff, with £32 12s. 7d. damages, subject to the opinion of the court on a case which stated,

That the defendant, a farmer at Thaxted, in the county of Essex, and a man of substance and property there, in May, 1784, sent his wagon to Cambridge, with two servants, a man and a boy; and in returning from thence with a load of oats, when they came to the parish of Sawston, in the county of Cambridge, the boy sitting on the shafts of the wagon, a cart happened to pass by, and the whip of the driver of the cart touching one of the wagon horses as they passed, the horse took fright and started aside, whereupon the boy fell off the shafts and had his leg and thigh fractured by a wheel of the wagon going over him, so that he could not be removed from the parish of Sawston without endangering his life. The plaintiff, who was a parish officer of Sawston, took care of the boy and employed a surgeon to attend him, and expended in his necessary maintenance and cure £32 12s. 7d., the sum

¹ S. C. 2 Esp. N. P. C. 739.

for which the action was brought. The defendant knew of the accident the same night that it happened, and six weeks afterwards went to Sawston, when he found the surgeon going to amputate the limb that was fractured, and before the operation asked the boy if he consented; and the boy consenting, the limb was taken off. The boy was a yearly servant to the defendant at £1 10s. a year, and was settled at Thaxted. After his cure, he served out his year with the defendant, and received his whole year's wages.

The question was, whether, under all the circumstances, the plaintiff was entitled to recover.

Sayer, for the plaintiff.—The first question is, how far the master is liable for the cure of his servant who is sick by the act of God or accident; the second, whether, under the *particular circumstances of this case, [285] the defendant is not liable. 1st. By the Roman law, slaves abandoned in sickness were *ipso facto* disfranchised. The master could not retain any part of the servant's wages on account of sickness, and the servant himself is not liable. *R. v. Christchurch*, Burr. S. C. 158. In case of casual poor, the parish where the accident happens is liable in strict justice, but still has a claim upon the parish where the pauper is settled. The parish where he is settled could not be liable, because he is not a pauper. If the accident had happened in that parish, the master must have paid. The master is the only person ultimately liable—liable to maintain his servant both in sickness and in health. *R. v. Hales Owen*, B. R., T. 4 Geo. 1, 1 Str. 99. If the servant is beaten, the master may recover the money he has paid for his cure. *Everard v. Hopkins*, B. R., T. 12 Jac. 1, 2 Buls. 332, *Watson v. Turner*, Exo. T. 7 Geo. 3, B. N. P. 281.

Wilson, contra.—First, the action is not maintainable by one parish officer alone. It is not stated expressly that there were more, but it sufficiently appears, for the plaintiff is entitled a *parish officer*. Secondly, no order on the parish is stated, and the payment therefore was voluntary. *Simpson v. Johnson*, B. R., M. 19 Geo. 3, ante, vol. i. p. 7. Thirdly, the action should have been brought either by the servant, or by the surgeon and the other persons who provided the necessaries. A right of action cannot be transferred. No case can be mentioned in which a parish laying out money previously to an order has been held entitled to be reimbursed. The parish can have no relief against the master till an order is made. Here there was no express undertaking by the master, and his circumstances and ability are immaterial. The general question is, whether a master who has lost the services and paid the whole wages of his servant is liable to pay for an accident arising from the neglect of his servant, who was wrongfully riding on the shafts of the carriage. There is no implied contract. *R. v. Christchurch* is distinguishable. There the sending to a hospital is stated as an act of kindness, which it would not be if the master were bound. The general practice of gentlemen sending their servants to hospitals proves the understanding that masters *are not liable; for if they were it would [286] be a breach of trust in the guardians of the hospitals to receive, and an act of meanness in the master to send, the servant. Part of the plaintiff's claim certainly arises from the maintenance of the servant, but the master is only bound to maintain him in his own house. If the master is liable at all, it is to the servant, and not to the parish officers.

Lord MANSFIELD.—I do not applaud the humanity of the master. He makes no inquiry for six weeks, and then passes by on the other side. In general, from humanity and kindness, a master should take care of his servants, but the question here is what is the law. For the remedy over there is no authority in principle, and no *dictum* has been cited. The parish where

the accident happens is bound to take care of the man, and in so doing they merely do their duty. I cannot say that the master is bound.

Judgment for the defendant.¹

¹ The rule is now clearly settled that the overseers of the parish where the accident happens are legally liable for the expenses of the cure, without any express promise; *Tomlinson v. Bentall*, B. R., T. 7 Geo. 4, 5 B. & C. 788: and the parish where the pauper is settled is not liable; *Gent v. Tomkins*, Id. 746, (n); nor is it liable over to the parish in which the accident happened. *Atkins v. Banwell*, B. R., T. 42 Geo. 3, 2 East, 506. Where the accident happens in one parish, and the pauper is conveyed (without fraud) into another parish where he is visited by the overseer, and attended by the parish surgeon with the knowledge of the overseer, the latter parish is liable; *Lamb v. Bunce*, B. R., T. 55 Geo. 3, 4 M. & S. 275. And where a pauper residing in the parish of A. received during illness a weekly allowance from the parish of B., where he was settled, it was held that an apothecary who had attended the pauper might recover in an action for the amount of his bill against the overseer of B., who expressly promised to pay it. *Wing v. Mill*, B. R., M. 58 G. 3, 1 B. & A. 104. See also *Rex v. St. Lawrence*, Ludlow, B. R., T. 2 Geo. 4, 4 B. & A. 660; *Simmons v. Wilmot*, cor. Lord Eldon, 3 Esp. N. P. C. 91.

With regard to the liability of the master, it is said by Lord Eldon to have been ruled by Lord Kenyon, that when a servant living under the roof of his master falls sick, the master is liable for medicines provided for his servant, if his illness has not been the consequence of his own misconduct or debauchery. *Simmons v. Wilmot*, 3 Esp. 98. The case alluded to by Lord Eldon appears to be that of *Scarman v. Castell*, 1 Esp. N. P. C. 270, in which the principal case was cited under the name of *Luby v. Wiltshire*, and distinguished by Lord Kenyon. The doctrine of Lord Kenyon

[*287] was however much *questioned in *Wennall v. Adney*, C. B., M. 43 Geo. 3, 3 B. & P. 247, where it was held that a master was not liable for medical attendance on one of his servants at his mother's house.

As to the settlement of the servant where the master refuses to take him back after the accident, see *The King v. The Inhabitants of Sharrington*, B. R., M. 25 Geo. 3, ante, p. 11.

The COMPANY of the PROPRIETORS of the Navigation from the TRENT to the MERSEY v. WOOD.¹ April 25.

The carrier of goods by water is liable for damage occasioned by running against an anchor to which no buoy appeared to be fastened.

THIS was an action for money paid by the plaintiffs, the owners of a vessel called the *Friend's Goodwill*, to the use of the defendant, for the expense incurred in recovering certain goods of the defendant. The trial came on before NARES, Justice, at the last assizes for Oxford, when the plaintiff was nonsuited; and upon a rule to show cause why there should not be a new trial, the substance of the evidence appeared from the judge's report to be as follows:—

The defence was that the goods were *wetted and damaged* in the carriage, and that the plaintiffs were not entitled to recover because the injury sustained by the goods was the consequence of their own negligence.

John Watkinson said he had been a seaman five years; that he was well acquainted with the navigation from Hull to Gainsborough. He saw the *Friend's Goodwill* sink on the opposite side to where the *Unity* brig lay, the wind being west-northwest, and the tide running up and the ship with it and on the lee-side, opposite to the brig, on the Gainsborough side. The ship was steering between the brig and her anchor: there was no buoy, and the anchor was not in its proper place: it ought to have been 20 or 25 yards farther from the brig, and then there would have been room to have gone between them. He supposed those who were navigating the ship thought the

¹ S. C. 3 Esp. N. P. C. 127.

anchor was farther from the brig. As it did lie, it would not have been improper to have steered round it. There were several vessels moored on the Gainsborough side; and if the ship had gone on the other side, they must have struck against other anchors. He looked *at the ship half an hour before she sunk, but could see no buoy.—On his cross-examination he said he did not know who, or how many, or if any people were on board the brig: that there should have been a buoy; for want of which, or its being in an improper place, the ship was sunk.

John Morden, master of a Nottingham boat, said he was near the brig, and saw her plainly. He saw the ship come up, and watched her. There was no buoy to the brig: if there had he must have seen it. He thought the ship was within the anchor, for he concluded the anchor itself was right. The ship came so near the brig as almost to reach her rigging.

George Bingham said he was close to the Gainsborough side. He looked before the ship came up, and saw no buoy.

John Hyde said he lived at Gainsborough, had been a master 19 years, and had known the navigation 25 years, and was perfectly acquainted with it. There should have been a buoy 25 or 30 yards from the brig. It is the common custom to sail between the anchor and the vessel, because it is not safe to go round. With a leeward wind and tide it is right to keep as near the vessel as possible. The most skilful navigators always do so. He saw that the anchor was not more than 30 feet from the brig, and the cord of the buoy was so entangled in the flocks of the anchor that the buoy could not float. If the anchor had been but five feet under the water, the fluke or wake would have shown where it was; but this anchor was 13 feet under water. There is no stopping a vessel coming up with wind and tide, nor was there any room to throw the ship up. He did not know of any insurance in this case. The rate of insurance is five per cent. on a ship for a year. Some insure, others do not. It is a very dangerous voyage.

The counsel for the defendant called no witnesses, but insisted that this was a loss the plaintiffs were obliged to make good; for that a carrier or hoyman is bound to make good every loss but such as happens by the act of God or the king's enemies.

The counsel for the plaintiffs contended, that as there appeared no negligence they were entitled to recover: for as it is a dangerous voyage, the defendant ought to have insured; and as he had not, his only remedy was against the owner of the *Unity* brig, whose anchor being improperly placed had occasioned the loss.

*The judge stated, that he was of opinion that this was a loss [289] which the plaintiffs were bound to make good: that the defendant was under no necessity of insuring; and that it would be strange to say that he must bring an action to recover a satisfaction from the owner of the brig: that he remembered and had a full note of a case of *Dale v. Hall*, B. R., M. 24 Geo. 2, 1 Wils. 281, in which it was solemnly determined by *LEE*, Chief Justice, and *WRIGHT*, *DENNISON*, and *FOSTER*, Justices, that a hoyman is liable for all accidents except such as happen by the act of God or the king's enemies.

Couper and *Brown* now showed cause.—The only question is whether the proprietors of the vessel were in this case answerable. *Dale v. Hall*. The plaintiffs expended a large sum of money in getting the goods (flax) cured, and the defendant afterwards received them, but refused to pay the plaintiffs for the expense they had been put to in the curing, and for which this action was brought. Carriers are liable to make good any damage which happens, upon this principle, that they might otherwise collude with robbers. Where the act of God discharges the carrier, it is because he has no remedy

over; but in other cases he is put to his recovery over, because he has a knowledge of the precise facts, which the owner of the goods may not possess. The present is not a case of inevitable necessity, but of negligence in a third person.

Bearcroft and Plummer, contra.—This is a general question affecting all common carriers. They are the bailees of goods, and are liable if they can be fixed with the smallest degree of negligence; but in this case the utmost caution would have been unavailing. The plaintiffs then having not been guilty of negligence, and the damage being occasioned by inevitable accident, the money expended in curing the goods may be recovered.

The accident arising on a dangerous sea voyage, usually insured against, which differs from land carriage, the owners of the goods are liable unless there was some special acceptance of the goods by the plaintiffs to carry them safely, which should have been left to the jury. The accidents on a sea voyage are so various that it is unreasonable that the consideration of the freight should make the owners liable. [Lord MANSFIELD.—I wish to [*290] know whether there is any *authority for the distinction between a land and sea carrier, and whether the owner of a ship is liable for pirates?] *Cowper*.—In *Barclay v. Y. Gana*,¹ the owners were held liable for the acts of a gang of fresh-water pirates, whom it was found they could not resist.

Lord MANSFIELD.—This is a general question, and no case has been cited directly in point, but the general principle is clear. The act of God is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident. The case of robbers is established and is extremely strong. In this case the injury arises from the conduct of a private man, and it may be said that there was some negligence here, for there was a sloop at anchor, and the plaintiffs should have looked out for the anchor.

WILLES, Justice.—I am of the same opinion. The case of robbers extends to pirates. Though negligence is laid in the declaration, it is not necessary to be proved.

ASHURST, Justice.—I lean in favor of the rule already laid down, and no authority has been cited against it. It will make carriers more careful in future. In the present case they were not free from negligence. They saw a vessel at anchor, and that anchor must have been somewhere.

BULLER, Justice.—The plaintiffs have put this case on two grounds. First, that they are not liable generally: Secondly, that a special acceptance of the goods ought to have been shown. The general question has been often decided. There is no distinction between a land carrier and a water carrier. I am unwilling to depart from an established rule. The danger from robbers is as strong as this case, and is equally inevitable, yet the carrier is liable. With regard to the second ground, it cannot be supported; for as to the freight being too small in proportion to the danger, the answer [*291] is, that the carrier set his own price. I cannot agree *with my brother WILLES, that negligence need not be proved. Negligence, in point of fact, should in general be proved, but negligence in point of law is sufficient if the facts proved show what the law calls negligence. Here I

¹ B. R., E. 24 Geo. 3, rate, vol. iii. p. 389, and see note (i) vol. iii. p. 891. "As soon as any goods are put on board, the master must provide a sufficient number of persons to protect them; for, even if the crew be overpowered by a superior force, and the goods stolen, while the ship is in a port or river within the body of a county, the master and owners will be answerable for the loss, although they have been guilty of neither fraud nor fault, the law in this instance holding them responsible, from reasons of public policy, and to prevent the combinations that might otherwise be made with thieves and robbers." Abbott on Shipp. 223, 5th ed.

think there was negligence. If there was a buoy, the master ought to have seen it; if there was no buoy, it was the more suspicious. Rule discharged.'

¹ See *Forward v. Pittard*, B. R., M. 26 Geo. 3, 1 T. R. 27.

ARMITAGE, Spinster, v. DUNSTER. April 25.

In an action for slander *per quod*, it is not sufficient to prove equivalent words of slander, though explained in the same sense by the defendant himself.

THIS was an action for words, which was tried before GOULD, Justice, at the last assizes for the county of Surry, and a verdict found for the plaintiff.

Mingay obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered; and this day the case was argued by *Pigott* and *Russell* for the plaintiff, and *Mingay* for the defendant. The material count in the declaration (among many others) set forth that one Billiter, a man of character and substance, had made his addresses to the plaintiff in the way of marriage, and that the defendant, well knowing, &c., spoke the following words of the plaintiff, viz., "*I have had carnal knowledge of her;*" by reason whereof Billiter declined, &c., and she lost her marriage. The plea was, *Not guilty*.

By the report of GOULD, Justice, it appeared "that the plaintiff called four witnesses, Payne, Ash, Billiter, and Hanson. Payne proved that on the first of last January, at a club held at an alehouse at Peckham, there was a public conversation about Billiter's courtship of the plaintiff, whom the defendant had courted, but she had turned him off, as Billiter was thought a better match: that the defendant then said, '*he was very welcome to ride in his old boots.*' The witness being intimate with Billiter, informed him of this. At the next club, on the 1st of February, Billiter and the defendant being present, Billiter asked the defendant what he meant by riding in his boots, and said he could not explain his meaning. The defendant laid half a crown that he could. He was very much in liquor, but though drunk *was tender of the matter. He was loth to speak. [292] Billiter called him rascal. He then said '*he had carnal knowledge of her, and would swear it.*'"

Ash saw Billiter and the defendant together on the 1st of February, when Billiter asked the defendant if he ever had carnal knowledge of Sarah Armitage (the plaintiff), and he said, "Yes, he had; and that Billiter was welcome to ride in his old boots; that there was room enough for him; that she would not breed." Billiter asked, "How do you know she will not breed?" and the defendant answered, "She is a whore, and I can prove it by Hannah Rhodes." The witness then spoke in favor of the plaintiff's character, and proved that Billiter had courted her.

On his cross-examination he said, that they were all drinking at the club; that he was there about three hours; that Billiter and the defendant were there when he came; that they had been drinking, but that the defendant was not drunk; that the first thing the witness heard was Billiter offering to lay half a crown about Sarah Armitage, but he could not say what the particular subject of the wager was.

Billiter, after proving the plaintiff's situation in life and good character, said he had visited her as a sweetheart, with a view to marriage, and that there was no other impediment but what he heard the defendant had said about his riding in the defendant's old boots: that Payne had informed him

of it : that on the first of February, at the public house, Ash sung a song about cuckolds, and the defendant pointed with two fingers at the witness : that he asked the defendant what he meant by calling the plaintiff's character in question, and said to him, "*How could you say that I was welcome to ride in your old boots?*" that one of the company then said he meant (using a term importing lying with her) ; and the witness then said to the defendant he believed he could not prove what he had said, and that he was a black-guard fellow. He answered that he had said no more than what was true. The witness then laid a wager of half a crown that he could not prove it ; and the defendant said he would swear it, and could prove it by Hannah Rhodes : "that he had carnal knowledge of Sarah Armitage, and could prove it by Hannah Rhodes:" that he called for a book (which the witness believed to be a Common Prayer Book), and swore. The witness said, you [*293] have destroyed the character *of a woman who has as good a reputation as any in the parish, and the happiness of two persons, meaning himself and her. Some of the company said, "If you marry her you will marry a whore;" and he answered that he believed he should not marry her now. He then proved that he was a man of substance.

On his cross-examination he said he had paid his addresses to her for three or four weeks, and had discontinued them on what he heard from Payne ; that from what Payne told him (which was near a month before the last club) he was determined to break off and not to marry her : that he was made the ridicule of the whole place ; and that he should not have resumed the courtship although the defendant should have denied speaking the words : that by "riding in his old boots," he understood that the defendant meant that he had been concerned with the plaintiff.

Hanson was only called to the plaintiff's character.

The counsel for the defendant did not call any witnesses, but they objected that the words laid in the declaration, in themselves, and abstracted from the temporal loss, were not actionable, being only what is called spiritual defamation : that it appeared by Billiter's evidence that he broke off the courtship on account of the expression of the defendant which Payne had related to him ; and as there was no count containing or founded upon that expression, the declaration was not proved.

The judge in his report, after stating the evidence and the objection taken, observed, that if that objection had made a stronger impression upon his mind than it did, he could not have prevailed on himself, where the proof was so strong, to have nonsuited the plaintiff against the clear justice of the case. But, 1st, he was inclined to think, that as the words spoken by Payne were precisely of the same import with those in one of the counts, the substance of the slander was proved, the evidence making no difference either in aggravation or extenuation, and that, with a proper averment, the recovery in this case might be pleaded in bar to an action on those words ; 2d, that he saw this case in another and peculiar point of view, because the defendant himself had explained his meaning by the expression proved by Payne to have been "that he had had carnal knowledge of the plaintiff."

**Pigott* and *Russell* showed cause. The loss of marriage must be [*294] admitted to have been the consequence of the first words, but these words were explained by the defendant himself to mean that he had had carnal knowledge of the plaintiff ; and that was the sense in which the words were understood at the time. In general, the meaning or explanation of words cannot be laid in the declaration instead of the words themselves ; but this is a particular case, for the words were so explained by the defendant himself.

Lord MANSFIELD.—There can be no doubt in the case. Every honest

mind must lean against a nonsuit. But it is impossible here, for the words as spoken wanted explanation. Rule absolute for nonsuit.¹

¹ See *Maitland v. Goldney*, T. 42 Geo. 3, 2 East, 484.

FOLEY v. Lord PETERBOROUGH. April 26.

It is not a bar to an action of crim. con. that the plaintiff allowed the defendant to remain in his house after a suspicion of his wife's fidelity has been intimated to him.

This was an action for criminal conversation, in which a verdict had been found for the plaintiff at the last assizes for Herefordshire. A rule for a new trial had been obtained by *Mingay*, on the 16th April, upon the ground that the verdict was against evidence. He said that Lady Anne Foley had been guilty of infidelity with many persons before; that Mr. Foley knew it in some instances, and was cautioned against Lord Peterborough, yet that he kept him in his house when his lordship wished to go, and told him not to be vain of Lady Anne's favors, for that she shared them to all men alike; that he left him in the house alone with her for days, and brought him back from Cheltenham.

Bearcroft, Lee, and Couper showed cause, *Mingay* and *Lane* contra.

Lord MANSFIELD.—This application is made on the ground that Mr. Foley connived at the adultery of his wife. I was the first who held this to be a bar to the action in a case before Sir R. Worsley's case. But it is not enough that the husband is loath to see what others see; and there is no color in the evidence of any knowledge or connivance on the part of the plaintiff. He was not privy to the former *adultery; he received the information [*295] with great agitation, and never afterwards speaks to Lloyd, the party charged with it. At the same time a suspicion is intimated of Lord Peterborough. He disbelieves it, but orders, out of decency, that Lady Anne shall not again ride out with him. None of the witnesses state that he knew or connived at the adultery. Rule discharged.¹

¹ "The law on this subject," says Mr. Justice BULLER, *Duberley v. Gunning*, B. R. E. 32 Geo. 3, 4 T. R. 657, "is now clearly settled to be, that if the husband consent to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even of loose and improper conduct, not amounting to a consent, it only goes in reduction of damages." Lord KENYON went further, and ruled that the husband suffering a connexion between his wife and other men was equally a bar to the action as if he had permitted the defendant to be connected with her. *Hodges v. Windham*, Peake, N. P. C. 89. But if the wife be a prostitute, and the husband not privy to it, it only goes in mitigation of damages. Per De Grey, C. J., *Howard v. Burtonwood*, cited 1 Selw. N. P. 12, 4th edition. *Smith v. Allison*, cor. Lord MANSFIELD, sittings after T. T., 5 Geo. 3, B. N. A. 27.

COCKING and Another v. FRAZER.¹ April 26.

Insurance on goods with the usual memorandum, "Corn, fish, &c., warranted free from average, unless general, or the ship should be stranded." A quantity of fish, part of the goods insured, was so much damaged by the perils of the seas, that on putting into the port of Lisbon, on a survey by the Board of Health at that place, the fish was declared to be, and in fact was, of no value. Held that this was not a total loss of the fish.

The ship, and goods in the ship, called the *Three Friends*, was insured by the plaintiffs, "at and from St. John's, Newfoundland, to her port of discharge

¹ S. C. Park, Inst. 151, 6th ed.

in Portugal," and in the policy was contained the usual memorandum, "that corn, fish, salt, flour and seed, were warranted free from average, unless general, or the ship should be stranded." The defendant underwrote this policy for £100. On the 2d of December the ship sailed from St. John's with a cargo of fish, and on the 11th of the same month 40 quintals of the fish were hove overboard for the general preservation of the fish and cargo. On the 20th, [*296] 26 quintals more were hove overboard for the same purpose. *The weather was extremely bad till the arrival of the ship at Lisbon on the 10th of January, 1784, where a survey was had at the request of the captain, who was also the consignee of the fish, by the Board of Health at Lisbon, to whom it appeared, and in fact the case was, that the fish was rendered of no value through the dangers of the sea. The ship did not proceed from Lisbon on her destined voyage.

The plaintiffs having brought an action on this policy the defendant pleaded the general issue, and also paid into Court £16 19s. 6d. viz. £8 15s. per cent. as a general average upon the cargo, and £8 4s. 6d. per cent. as a particular average on the ship.

The cause was tried at Guildhall at the sittings after last term before the Earl of MANSFIELD, where a verdict was found for the plaintiffs, with £51 5s. damages, subject to the opinion of the Court, on a case in which the facts above-mentioned were set forth.

The question stated was, whether the plaintiffs were entitled to recover the remainder of the £100 underwritten by the defendant on the policy in question, as far as related to the cargo. If the Court should be of that opinion, the verdict was to stand; if not, a verdict to be entered for the defendant.

Baldwin, for the plaintiff.—The only question is, whether as a part of the cargo was thrown overboard during the voyage, which made a general average, the remainder of the cargo, being destroyed by dangers of the seas, is to be considered as a total loss. The insurer here has lost the benefit of the cargo, one part of it being thrown overboard, and the remainder spoiled and rendered of no value. The sum paid into Court is in full for the fish thrown overboard. It is now for the Court to determine the use of the memorandum "free from average, unless general, or the ship be stranded." It cannot be contended that because the owner of the goods has contributed as to a general average that therefore there is not a total loss. In *Mason v. Skurry*, B. R., H. 20 Geo. 3, Park, Inst. 160, 6th edition, the question was, whether it was a total loss where enough was not saved to pay the freight. But here there is nothing saved.

Erskine, contra.—A policy of insurance is a contract of indemnity as far as it extends, but the question is, whether the underwriter has undertaken to [*297] indemnify the plaintiff *as far as the value of the fish extends. The memorandum is inserted because no one would underwrite perishable goods without it. The underwriter is only liable in one of two cases, neither of which has happened. Here is a general average, and the underwriter has paid his contribution. A total loss there is not, nor would there have been even if instead of 40 quintals all but 40 quintals had been thrown overboard. Total loss must mean of the whole cargo, and not of a part of it. [BULLER, J.—In *Mason v. Skurry* the Court thought at first it was a total loss, and it went down to a new trial on that idea; but on the second trial it appeared clear that there never was an instance of a payment for a total loss in these cases, where the thing existed, though of no value.] Lord MANSFIELD then stopped Mr. *Erskine*, adopting this idea of the meaning of loss.

Baldwin, in reply.—The remainder was as much a total loss as that which was thrown overboard. The jury have actually found that the remainder was of no value. In *Mason v. Skurry* it was found that the remainder was of some value.

Lord MANSFIELD.—In general litigation arises from the parties mistaking the question, and not understanding the terms of it. The memorandum is a very old clause in policies on perishable goods. The underwriter only undertakes to indemnify against particular losses where the ship is stranded. Total loss means a loss of the goods, and not of the value and condition of the goods. Here the fish comes to port—it is stinking; that is damage to the value, against which the insurer does not insure. Nonsuit to be entered.¹

¹ The authority of this case has been frequently questioned by Lord Kenyon, in *Burnett v. Kensington*, B. R., E. 37 Geo. 3, 7 T. R. 222; by Lord Alvanley, in *Dyson v. Rowcroft*, C. B., T. 43 Geo. 3, 8 B. & P. 476; and by Lord Ellenborough, in *Colgan v. London Assurance Company*, M. 57 Geo. 3, 5 M. & S. 455. But see the language of Lord Kenyon in *M'Andrews v. Vaughan*, sutt. at G. H. after H. T., 1793, Park, Ins. 155, 6th edition.

*GOODRIGHT, Lessee of PARSON v. HERRING and others. [*298]
April 26.

Devise to “*R. P.* and his assigns for and during the term of his natural life, and from and after his decease, to the use and behoof of the heirs male of the body of the said *R. P.* lawfully to be begotten, and of the heirs of the body of such heir male lawfully issuing; and for want of such issue male of the said *R. P.*, or in case such issue male should not live to attain his age of 21 years, then,” &c. held that *R. P.* took an estate tail.

EJECTMENT tried at the last Assizes for the county of Devon, when the following case was reserved.

George Edgecomb being seised in fee of the premises in question, by his will bearing date the 19th of January, 1769, and duly attested for passing lands, devised them in the following words:—

“I give and devise unto John Herring, of, &c., and Charles Hawke, of, &c., their heirs and assigns (all the premises) in trust, and to and for the several uses, behoofs, intents, and purposes hereinafter limited, expressed, and declared of the same, that is to say, to the use and behoof of my nephew Richard Parson, of, &c., and his assigns, for and during the term of his natural life, and from and after his decease, to the use and behoof of the HEIRS male of the body of the said Richard Parson, lawfully to be begotten, and of the heirs of the body of such HEIR male lawfully issuing; and for want of such issue male of the said Richard Parson, or in case such issue male shall not live to attain his age of 21 years, then to the use and behoof of my nephew, Thomas Parson, of, &c., his heirs and assigns for ever.”

The devisor afterwards died without altering or revoking his said will; and upon his death, Richard Parson, the first devisee, entered upon the premises, and afterwards duly suffered a recovery thereof, and by will, duly executed, devised the same to the defendants as trustees, for the benefit of his wife and daughter, and died without issue male in January, 1783. Previous to the said recovery, the said Richard Parson, by indenture dated 16th of January, 1771, demised the premises to George Parson for 99 years, if he the said Richard Parson should so long live, in trust for himself. The lessor of the plaintiff was Thomas Parson the nephew of the devisor, to whom he devised the remainder in fee.

Lawrence, for the plaintiff.—Although the Court has referred to the case of *Goodright v. Pullyn*, B. R., M. 13 Geo. 1, 2 Lord Raym. 1437; and see *Dean dem. Webb v. Puckey*, B. R., T. 33 Geo. 3, 5 T. R. 299, as in point, *yet I conceive there is some difference. It is now settled that if [*299] there is a clear intent it will make an estate for life. If all the words

in the will can have effect, they shall. In *Goodright v. Pullyn* it was held, that the superadded limitation in fee could not make words of a purchase, for then the words "heirs male" would be rejected. Here the superadded limitation is very different from the first limitation, and there is no doubt to what it refers. I conceive that the words "heirs male" mean first and other sons. If it is not construed to be a life estate, the subsequent limitation must be rejected. This is similar to the case put by Anderson in *Shelley's case*, 1 Co. 95 b. With regard to the intent, *Bagshaw v. Spencer*, 1 Ves. sen. 142; 2 Atk. 246; 1 Coll. Jur. 378, is in point. [*Cur.*—That was a trust estate, and the case does not apply.] The second limitation here is in tail general, the first in tail male. The testator therefore meant that the first words should be words of purchase. Besides, he had in contemplation a dying within 21, which is not like an indefinite failure of issue.

Butt, contra.—This case is fully within the principle of *Goodright v. Pullyn*.

LORD MANSFIELD.—In the times of tenure it was a rule that an estate should not be limited to an ancestor with a remainder to his heir, because it destroyed the rights of tenure. Since that time the Courts have inclined to narrow the rule, because the reason upon which it was grounded has ceased, and words of limitation may in many cases be words of purchase. But this is within the principle of adjudged cases. In *Ambrose v. Hodgson*, ante, vol. i. p. 337, the Court for the sake of certainty adhered to the rule established.

WILLES and ASHURST, Justices, were of the same opinion.

BULLER, Justice, mentioned *King v. Burchell*, ambl. 379, cited 2 Burr. 1103; 4 T. R. 396 (u). Postea to the defendant.¹

¹ The present is a middle case between the case put by Anderson, where the second limitation to the heirs is narrower than the first, and the cases cited of *Goodright v. Pullyn* and *King v. Burchell*, where the second limitation is in fee. Here the first limitation is in tail male, the second limitation in tail general, and the case therefore comes within the principle of *Goodright v. Pullyn*, and *King v. Burchell*, according to the reasoning of Mr. Fearn. "There does not appear *to be the same inconsistency in construing the first words, which describe heirs special, to be words of limitation, where the superadded words extend to heirs general, as there is where the first words and those engrafted on them distinguish two different incompatible courses of descent, and would not carry the fee to the same persons. In the latter case it is absolutely impossible by any implied qualification to reconcile the superadded words to those preceding them so as to satisfy both by construing the first as words of limitation; whereas in the former case the superadded words are not contrary to or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition that they were used by the testator in the same qualified sense as the preceding, and then both may be satisfied by taking the first as words of limitation."—Fearn on Cont. Rem. 183, 7th edition.

The KING v. The Inhabitants of THAMES DITTON.¹ April 27.

A negro brought into this country by her master, and continuing to serve him here for a year, does not gain a settlement, for there is no hiring.

CHARLOTTE HOWE was removed under an order of two justices, from the parish of Thames Ditton, in Surrey, to the parish of St. Luke's, Chelsea, in Middlesex. Upon an appeal to the Court of Quarter Sessions for Surrey, the order was quashed, and the following facts stated :

¹ S. C. 2 Bott, 209, 6th edit. ; from Serjt. Wilson's MSS.

The pauper was bought in America by Captain Howe as a negro slave, and by him brought to England in 1781. In November, 1781, Captain Howe went to live in the parish of Thames Ditton, and took the pauper with him, and she continued with him there in his service, till the 7th of June, 1783, when he died, soon after which the pauper was baptized at Thames Ditton, and she continued to live with his widow and executrix, who soon afterwards removed to the parish of St. Luke's, Chelsea. There the pauper continued to live with her as before for five or six months, when she left her.

The ground of the order of removal was that the pauper had served the last forty days at the parish of St. Luke's, Chelsea.

Palmer showed cause. He contended that there was no hiring found upon the service in Chelsea, nor any fact from which a hiring could be implied. That there is no *case in which this Court will imply a hiring generally; though if a hiring is found, the court will imply a hiring for a [*301] year. That here there is no contract nor anything from which a contract can be implied. He submitted that as he was to support the negative, the other side should begin. And of this opinion was the Court.

Lee, Mingay, and G. Bond, contra. The pauper was to be considered the servant of Captain Howe during his life, and the life of his widow after his death. The legislature could not mean to exclude the particular case of this negro. The general scope of the acts is that no settlement shall be gained by a service of an indefinite duration, which would be to impose too heavy a burden on the parish. But where by the situation of the parties the pauper is bound to perform a permanent service, the master is bound to keep him. The Court has never decided that a negro brought to England is there under an obligation to serve. [Lord MANSFIELD.—The determinations go no further than that the master cannot by force compel him to go out of the kingdom.] The pauper remained his master's servant. Suppose a man were to serve "so long as his master provides necessaries for him," as Grotius puts it, *De jure belli, &c.* b. 2, c. 5, s. 29, part 2. There is nothing in the laws of England contrary to this. It appears in this case that the pauper has lived as a servant from year to year, and therefore is to be considered as a servant as far as the laws of England will permit. It would be hard if a person of this description should not be maintained and taken notice of by the law. [Lord MANSFIELD.—In the case relating to villeins, it was held that the lord could not by force take them out of the country.] This kind of service imports a particular hiring much more strongly than a bare service for a year. [Lord MANSFIELD.—The case of *Somerset, Howell's State Trials*, vol. xx. p. 1, is the only one on this subject. Where slaves have been brought here, and have commenced actions for their wages, I have always nonsuited the plaintiff.] The condition of slavery is not totally rescinded by the coming to England. With regard to the right to wages it still subsists. 1 Blackst. Com. 425. But wages are no necessary part of the contract for the purposes of a settlement. It cannot be contended that this was a voluntary *hiring, and therefore not a service; and if the [*302] service with the captain be admitted, it continues with his widow. The odious part of slavery, which is contrary to the laws of England, determines on the slave coming to England; and if the relationship of master and servant subsists on the coming to England, the master has the common legal remedy for his servant being taken from him *per quod servitium amittit*; *Chamberlain v. Harvey*, B. R., H., P. & G., W. 3; Carth. 396; 1 Lord Raym. 146; 5 Mod. 186, S. C.; and see *Forbes v. Cochrane*, B. R., M. Geo. 4, 2 B. & C. 458. The reason why a negro is not entitled to wages is because there never was a contract for wages, but wages are not essential to make a settlement.

LORD MANSFIELD.—We will not trouble Mr. Palmer. The poor law is a subsisting positive law, enforced by statutes which began to be made about the time of Queen Elizabeth, when villeinage was not abolished, and villeins in gross may, in point of law, subsist at this day. But the change of customs and manners has effectually abolished them in point of fact. The statutes do not relate to them, nor had they them in contemplation. The present case is very plain. For the pauper to bring herself under a positive law she must answer the description it requires. Now the statute says there must be a hiring, and here there was no hiring at all. She does not therefore come within the description.

Rule discharged.¹

¹ See *R. v. St. Mary*, Guilford, E. 25 Geo. 3, 2 Bott, 209, 6th edition.

PIGOT v. WHITE and Another. May 3.

An admiral who supersedes another admiral and takes him under command is entitled to 1-8th part of prizes captured after his taking such command, but under orders issued by the admiral who has been superseded.

ACTION for money had and received. *Plea, Non Assumpsit.*

On the trial before Lord MANSFIELD, at the sittings at Guildhall after last term, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case :

[*303] *In April, 1782, the plaintiff was appointed by the Lord Commissioners of the Admiralty commander-in-chief of his majesty's fleet on the West India station. By instructions from the Admiralty, bearing date the 1st of May, 1782, he was directed to proceed as expeditiously as possible to the West Indies, repairing in the first instance to Barbadoes, and from thence in search of Admiral Rodney (if he should not find him at that island, or sooner fall in with him), wherever he might hear of him, and follow his orders till he should give up to the plaintiff the command of his majesty's ships and vessels, when the plaintiff was to take the said command upon him, and to employ the said ships and vessels as well as such others as might from time to time be put under his orders in the best manner he should be able, for the security and protection of his majesty's islands in the West Indies, and his possessions in North America, and also the trade of his majesty's subjects agreeable to the instructions which had been given to the said Admiral Rodney on that head, dated the 6th of the preceding December, attested copies of which, as well as of all other instructions or directions given to him, which remained in the whole or in part unexecuted, he was directed to deliver to the plaintiff. By the instructions given to Lord Rodney above referred to, and to which the plaintiff was to conform, he was directed, if he discovered by the preparations of the enemy, or should have any other good reason to believe that an act was meditated against his majesty's possessions in North America, to proceed with the whole or such part of the force under his command as he should judge necessary, to reinforce the squadron on that station; and the admiral was directed in the month of July, or sooner if the enemy should quit the Leeward Islands before that time, to detach such part of his force as could be spared from the immediate defence of the said islands, or proceed with it himself to North America to join the squadron there, and to remain there until the first full moon in October, or so long as the enemy's fleet should continue in those seas. In July, 1782, the plaintiff, in pursuance of those instructions, set sail with his whole fleet for North America, and, on the 7th of September, being arrived off New York, took Admiral

Digby, who was commander-in-chief upon the North American station, under his command, as being the said Admiral Digby's senior officer, and continued to act as *commander-in-chief there until October following; Admiral Digby remaining with him, and acting as a subordinate officer during [*304] the whole of that time. Before the 7th of September, 1782, Admiral Digby had sent out several of the ships under his command to cruise against the enemy, and such cruisers after the 7th of September, and while Admiral Digby and his whole fleet were under the command of the plaintiff as the senior flag-officer, took several prizes, which were carried into New York, and there regularly condemned and sold by the defendants, who were appointed the prize agents. The 7th and 8th Articles in the general naval instructions established by his majesty in council are as follows:

ART. 7th.—“When any flag-officer or captain shall meet at sea or in foreign parts with a superior or senior officer, he shall show him the orders he is under; and if such officer should take upon him to give him other orders for his majesty's service, he shall obey him.”

ART. 8th.—“No superior or senior officer shall detain a junior, or give him any delay, or divert him from pursuing his instructions, unless it shall be absolutely necessary for his majesty's service; and in such case he shall send by the first opportunity a copy of the orders he has given him, with his reasons for so doing, to the secretary of the Admiralty.”

By the several proclamations for the distribution of prizes taken during the late hostilities it is declared that, in case any prize shall be taken by any ship under the command of a flag or flags, the flag-officer or officers actually on board, or directing and assisting in the capture, shall have one-eighth part, to be paid in the proportions and under the regulations therein mentioned, which, as far as they can affect the present question, are,

1. That a flag-officer, commander-in-chief, where there is but one upon service, shall have to his own use one-eighth of the prizes taken by ships under his command.

2. That a flag-officer sent to command at Jamaica or elsewhere shall have no right to any share of prizes taken by ships or vessels employed there before he arrives at the place to which he is sent, and actually takes upon him the command.

3. That when more flag-officers than one serve together, the eighth part of the prizes taken by any ships or vessels *of the fleet or squadron shall be decided in the following proportions:—If there be but two flag-officers, the chief shall have two-thirds, and the other the remaining third; but, if the number of flag-officers be more than two, the chief shall have only one-half, and the other half shall be equally divided amongst the other flag-officers. [*305]

The Admiral's eighth part of the prizes in question amounted to £16,527 11s. 2d., New York currency, being £9,366 10s. 9d. sterling, which, by the consent of all parties interested, was laid out by the defendants in the purchase of £16,952 6s. 6d. three per cent. Consolidated Annuities, which are now standing in the defendants' names to abide the event of this suit. The plaintiff claims one-half of the said annuities, and has brought this action for the recovery thereof, and of one-half of the dividends accrued thereon since the same were purchased.

The question stated for the opinion of the Court was, “whether under these circumstances the plaintiff was entitled to share in the prizes so taken, as senior flag-officer.”

If the Court should think him so entitled, the verdict to be entered for the plaintiff, with damages to the value of one-half of the said annuities and dividends; otherwise the verdict to be entered for the defendant.

On the argument, the parties were to be at liberty to refer to the proclamations and other papers mentioned in the case.

Pigott for the plaintiff.—The question is whether the plaintiff is entitled to a share of prizes taken while he was at New York, by cruisers sent out by Admiral Digby before the plaintiff arrived from the West Indies. The real parties are Admiral Pigot and Admiral Digby:—the defendant is merely a prize-agent and stakeholder. The prizes were taken after Admiral Pigot arrived and had the command. The proclamation only says he shall have no share of prizes taken before.

Erskine, contra.—The first part of the proclamation as to flag-officers provides that they must be on board, or directing and assisting in the capture. A flag-officer to entitle himself must have taken on himself the command of the vessel making the capture.—That vests the right. If Admiral Digby had been coming out to reinforce Admiral Pigot, and taken prizes within his limits, Admiral Pigot would have had no share till he had actually taken [*306] Admiral *Digby under his command. The principle seems to be that every Admiral shall have the fruit of his own orders. But independently of this construction of the proclamation, Admiral Pigot took the command, not by relieving him, but merely as his senior officer. Admiral Digby still continued commander-in-chief of the American squadron, but was obliged to receive orders from Admiral Pigot as senior officer. This is like the case of Commodore Elliot, who continued to share as flag-officer, though he was obliged to strike his pendant on the arrival of Captain Collingwood. If the plaintiff be right, he may share on two stations, and he would have a motive, should there be such an authority in his orders, to go without necessity to another station.

LORD MANSFIELD.—Though I intimated no opinion at *Nisi Prius*, yet I formed, when the case was opened, a very clear one. The question does not admit of a doubt. The value of prizes, and the appearance of hardship in particular cases, have occasioned many regulations since the reign of Queen Anne, when prizes were first given to the captors. But the present question has never been doubted. An officer sent to a station has been thought entitled before he arrives, but that idea has been corrected. He is entitled from his arrival, no matter by whom the orders were given. The words on board mean in service. Admiral Pigot went by order, and took Admiral Digby under his command, and was still in command when the prizes were taken. There cannot be a doubt.

WILLES, ASHURST, and BULLER, Justices, were of the same opinion.

Postea to the plaintiff.

DOE, Lessee of MOUNT, v. ROBERTS. May 8.

In the conveyance of an estate there was a covenant that the premises were free from incumbrances except particular leases. *Quære*, Whether these words affirm the leases, and whether parol evidence is admissible to show it was so intended. Lease under power to lease in possession was dated in March to hold from Michaelmas, but not delivered till Michaelmas. *Semble*, the lease is good.

EJECTMENT, tried before NARES, Justice, at the last assizes for Berkshire. The jury found a verdict for the defendant, and in the beginning of the term a rule was obtained to show cause why there should not be a new trial.

The report of the evidence was to the following effect:

[*307] *The premises were the estate of Sir Robert Smith, and on his marriage, an annuity of £900 was secured upon them to his wife for life. In 1787, by proper conveyances, to which Sir Robert, his lady, her

father and brother, and his eldest son, Hervey Smith, were parties, they were settled on Sir Robert for life, remainder to trustees to secure the annuity of £900, remainder to Hervey Smith in tail, with remainder over, and a power reserved to Sir Robert to grant leases for twenty-one years in possession, and not in reversion, so as on such leases the best and most usual yearly rent should be reserved. During the father's lifetime, Hervey Smith, by an agreement with John Dawes, reciting the yearly rent to be £500, or thereabouts, in consideration of £5000, covenanted to sell his remainder in tail to Dawes, and to make a good title; and, after his father's death, to do any act that might be required to bar the estate-tail, and vest the fee-simple in Dawes. Dawes afterwards declared himself a trustee for Mount, and conveyed his right to him, and in 1783, Mount paid £1000, which then remained due of the £5000, the rest having been paid by Dawes; and because it was alleged that the rent exceeded £500 a year, agreed to pay an additional £500. Sir Robert being offended with his son for having sold his remainder, in the year 1781, made a lease to the defendant, bearing date the 5th of March in that year for twenty-one years, to hold from Michaelmas next ensuing the day of the date, but in fact not executed till November. After Sir Robert's death, the defendant attorned to Mount, but Hervey Smith (then Sir Hervey) being called upon to suffer a recovery, refused, on which Mount filed a bill against him to oblige him to do so, and he a cross-bill to be relieved against the bargain as obtained by fraud and undue means in the name of another person, and without consideration. Before any answers were put in to these bills, a compromise was proposed by the solicitor for Mount, which took place, and a recovery was suffered, and deeds of lease and release executed, bearing date the 9th and 10th of July, 1785, by which, after reciting the bill and cross-bill, and the recovery, Sir Hervey Smith, in order to put an end to all suits, and in consideration of a further sum of £2000, conveys to Mount all the premises in fee free from all incumbrances, except the leases granted by Sir Robert Smith, and it was likewise thereby agreed that Mount should receive the rents from Michaelmas preceding, being the time of the last payment. It appeared by evidence which the learned judge admitted, that Mount's solicitor was apprised of the lease to the defendant and others under the same circumstances, that the executrix of Sir Robert (who would have been entitled to the rent due from the Michaelmas till his death, amounting to at least £100); and also that Sir Hervey would not consent to the last-mentioned deeds, without the insertion of the exception; that it was fully understood and agreed at the time of the execution of the deeds, that the leases should never be disputed. Besides the above evidence, witnesses were examined on both sides concerning the value of the lands, the lessor of the plaintiff endeavoring to show that the reserved rent was not agreeable to the power. As soon as the lease was produced, it was objected that it was made to commence *in futuro*, and therefore contrary to the power, and void. It was answered that the deed only took effect from the delivery in November, and for this purpose were cited *Osley v. Hicks*, Cro. Jac. 263, and 2 Inst. 674. The judge declined to determine the point at *Nisi Prius*, and permitted the cause to proceed; and after summing up the evidence, he put this preliminary question to the jury; viz., Whether, supposing the leases void in point of law or equity, the lessor of the plaintiff had not agreed to take the estate subject to them, he having a consideration for so doing. Their answer was, "That it appeared to them that whatever objections there might be to the leases, the lessor of the plaintiff contracted and agreed never to take advantage of them." Upon this the verdict was taken for the defendant.

In the case of *Doe v. Butcher*, B. R., M. 19 Geo. 3, 1 Dougl. 51, notice was given upon that ground.

Miles showed cause in support of the verdict, and contended, that at all events, as the lessor of the plaintiff had accepted of an attornment from the defendant, he was bound to consider him as tenant from year to year, and to give him six months' notice to quit, which not having done, the defendant was entitled to keep his verdict. [Lord MANSFIELD.—If it appear on the whole that no injustice has been done, the Court will not grant a new trial.

There are two questions here on the merits; viz., 1. Whether *the [*309] lease is good under the power; 2. Whether the lessor of the plaintiff, having bought the estate subject to the leases, and having received a consideration for them, is not precluded from calling them in question.]—1. The lease had no effect till the delivery, and therefore, though the commencement was subsequent to the date appearing on the face of the instrument, it was in fact, and in legal operation, a lease in possession, and not in reversion. 2. The lessor of the plaintiff is precluded from taking advantage of the defective execution of the power, if such defect exists in point of law, both by the exception in the conveyance, and by what is proved to have passed relative to that exception, and the consideration given for it. [BULLER, Justice.—How can you support the admissibility of that parol evidence?] The ambiguity in the words of the exception renders an explanation by oral testimony admissible and necessary.

Lord MANSFIELD.—There is considerable weight in the argument that the lease took effect only from the delivery, and was therefore a lease in possession within the words of the power. The best way will be to grant a new trial, that the case may be thrown into the form of a special verdict.

BULLER, Justice.—There was evidence relative to the amount of the reserved rent which the jury did not consider, and therefore, though the Court should be with the defendant on the question on the commencement of the lease, *Campbell v. Leach*, Amb. 740, there must be a new trial.

The rule made absolute.

ROE, Lessee of BRISTOW v. PEGGE.¹ May 4.

In ejectment the tenant shall not be allowed to set up an outstanding term in trustees to secure an annuity, provided the lessor of the plaintiff do not seek to disturb the possession of the trustees.

On a rule to show cause why the nonsuit in this case should not be set aside, the facts, upon the report of HEATH, Justice, before whom the ejectment was tried at the last assizes for Nottingham, appeared to be as follows :—

*The lessor of the plaintiff claimed a moiety of the manor of W. [*310] and other lands mentioned in the declaration; and he proved that he was a joint heir with the defendant, being descended from a daughter of their common ancestor. On the part of the defendant was produced a marriage settlement, dated the 18th of February, 1748, by which Darcy Burnell (who was then seised in fee of the premises mentioned in the declaration, and under whom both parties claimed), previous to his intermarriage with Mary Pake, among other limitations, conveyed the same to several trustees for the terms of 99 and 1000 years respectively. The trusts of the term for 99 years were for raising and paying £200 a year to Ellen Burnell for her life. The trusts of the other term were declared to be, that in case there should be

¹ S. C. 1 T. R. 758 (a).

no issue of the marriage, the trustees should, out of the rents or profits, or by mortgage or sale, raise the sum of £300, to be paid to the said Mary Pake, if living, within six months after the decease of Mary Burnell, or, in case of her death, to such persons as she should, by deed or will, appoint, and for want thereof, to her executors or administrators. The marriage took effect. Darcy Burnell died on the 31st of May, 1774, leaving no issue, and his wife survived him, but is since dead. By his will, bearing date the 20th of March, 1772, he devised all his lands, &c., to trustees, to the use and behoof of such person and persons as, according to the laws of descent, should be his heirs, and the heirs of the body of such persons respectively, as tenants in common, if more than one, and not as joint tenants. The sum of £3000 was raised by way of mortgage under the term of 1000 years, and is still a subsisting charge. Ellen Burnell is still alive. The defendant, in November, 1776, filed a bill in the Court of Chancery, stating himself to be the heir-at-law of Darcy Burnell, the person last seised, and praying to have a conveyance of the premises to him and to the heirs of his body, pursuant to the will of Burnell. Afterwards, by leave of the Court of Chancery, he brought an ejectment, and directions were given that the two several terms should not be set up against his title. A verdict being found for him, the CHANCELLOR directed a conveyance pursuant to the prayer of the bill. In 1777, a receiver was appointed by order of the Court of Chancery for that part of the premises in the declaration which was not in jointure to Burnell's widow.

The judge was of opinion that the two subsisting terms of *99 [*311] years and 1000 years were a *legal* bar to the lessor of the plaintiff's recovering at law the premises mentioned in the declaration, and particularly that part of them of which the rents and profits were in the perception of the receiver appointed by the Court of Chancery. A nonsuit, therefore, was entered; but as the lessor of the plaintiff had been put to a very considerable expense in deducing a long pedigree from the year 1609, and had made out an undisputed equitable title, and the premises were of considerable value after the discharge of all the incumbrances, he gave leave to his counsel to move to set aside the nonsuit, and to enter a verdict for him, if the Court should be of opinion that he had a *legal* right, under all the circumstances of the case, to recover the whole or any part of the premises.

Dayrell, Wilson, and Brough, for the plaintiff.—The defendant's possession was the possession of the lessor of the plaintiff, they being tenants in common. The lessor of the plaintiff was willing to redeem his part, and the Court will not turn the plaintiff round and compel him to go into a court of equity. A mortgagee need not give notice to a tenant to quit before bringing his ejectment, if he mean only to get into the receipt of the profits, though the mortgage be made subsequently to the tenant's lease, *White dem. Whatley v. Hawkins*, M. 14 Geo. 3, Bull N. P. 96. [Lord MANSFIELD.—That is quite settled where there is no question about the inheritance. Notice is in that case given to the tenant that they are not to be disturbed, and the trial of the right shall not be prevented.] This case depends upon similar principles. Here the trustees are termors for a particular purpose. They know that neither they nor their *cestui que trusts* are to be disturbed. The Court of Equity has done in this case for Mr. Pegge what we ask for Mr. Bristow. An ejectment is now an issue to try the title. The defendant takes advantage of a mere matter of form to turn the plaintiff round. The term is not set up by the trustees, but by the defendant, who has no other right than that of the plaintiff. A case occurred at Guildhall in which a tenant attempted to set up a mortgagee's title against his landlord, but was not permitted to do so; for he shall not be allowed to avail

himself of the title of a third person. So here the trustees alone are the persons who shall be allowed to set up these terms.

[*312] **Balguy and Gally, contra.*—The terms in question are no part of the title of either party: they are prior to their title, and are created for distinct purposes. It is true that where terms are created, and the purposes for which they are created do not arise, the trustees become trustees for the heir-at-law; but in the present case the purposes have arisen and are subsisting.

It is sufficient to support the nonsuit that the plaintiff has no title, and it is not necessary for the defendant to show his own. It is not true, therefore, that an ejectment is an issue to try the right. The plaintiff must show a right to the possession: a contrary doctrine would make an end of all defences by outstanding terms. In *Doe dem. Henson v. Beaumont, Cor. Ashurst, J. Leicester Sum. Ass. 1784*, which was an ejectment by a devisee against the heir-at-law, on the defendant producing a mortgage term, the plaintiff was immediately nonsuited. It is not determined that in all cases a satisfied term shall not be set up. [Lord MANSFIELD, and BULLER, J.—It never shall. The doctrine is as old as Mr. Justice Gundry's time.] Suppose that two persons are equitably entitled, and one of them purchases a term: this is a defence, see *Goodtitle dem. Norris v. Morgan, B. R., E. 27 Geo. 3, 1 T. R. 75*,—[to which the Court assented]. The present is nothing more than an attempt to recover a reversionary interest in an action of ejectment, which cannot be.

Lord MANSFIELD.—An ejectment is a fictitious remedy to try the right of possession to land; and it is of great consequence that it should be adapted to that purpose, and not entangled in forms. Great difficulties have arisen from the mode of conveyancing since the statute of uses, not known in any other country. Everywhere else a man is entitled to the possession of his own estate; but in England terms are universal, and the Court must take care that where a term is a mere form and a muniment of the title, it shall not be set up against the true owner by a person who has no title himself.

But we must go a step farther. Where third persons have a right to the possession, the Court has prevented them from setting up their titles where it is not meant that they should be disturbed. It is true that the plaintiff must recover on the strength of his own title; but in order to prevent [*313] **the abuse of this principle*, the Court will not permit a tenant, whose title is not in dispute, to set it up. There is another case of the same kind. If a mortgager attempt to set up the title of a third person against his mortgagee, the Court will not permit it, for it does not lie in his mouth to deny the title of the mortgagee.

To apply these principles. The plaintiff complains that he is not let into possession of half as co-heir. The defence is, that there is a trust for a third person. To which the plaintiff replies, that he is willing to take it subject to that trust. Shall the co-heir then be suffered to set up that defence? I am clearly of opinion that a verdict must be entered for the plaintiff.

ASHURST, Justice.—The trustees take no step, and do not desire to have the possession. As against every one else, the plaintiff has a title. The defence is iniquitous. The purposes of the term will be sufficiently answered notwithstanding a verdict for the plaintiff.

BULLER, Justice.—The defence is, that the plaintiff must in every case recover on the strength of his own title. That rule has certainly been laid down, but the cases of the last century show that there are exceptions to it. There is first the case of the mortgager recovering against his own tenant. That case arose before me on the Oxford circuit. The tenant had got the mortgage deeds, and offered to produce them, but I rejected the evidence,

and it was acquiesced in. There is no difference between that case and the present. In Mr. Justice Gundry's time, an outstanding term was set up. He said there was no use in taking these old terms, but that money might be put into the pockets of the conveyancers. This has been acquiesced in for above forty years. So a reversion may now be recovered, subject to the lease. There is a possession here under one of the terms, for the possession of the receiver is the possession of the trustee. As to that there must be a rule that the plaintiff shall not disturb the possession, as was done in Whatley's case. But as to the annuity, we must give judgment generally, for Mrs. Burnell claims no possession. There is a difference between an annuity and a mortgage, for the mortgagee is entitled to have his whole money, but the annuitant is not to have possession if the annuity is paid.

Lord MANSFIELD.—Let the judgment be for possession *of all that is not in the hands of the receiver, the lessor of the plaintiff under-^[*314] taking not to disturb that possession. Rule absolute.¹

¹ The doctrine in this case that a subsisting term shall not be set up in ejectment where it is intended to disturb the possession of the termor, has been overruled by a series of decisions. In Doe dem. Hodsdon v. Staple, B. R., M. 29 Geo. 3, 2 T. R. 684, it was held by Lord KENYON, ASHURST, and GROSE, Justices, against the opinion of BULLER, J., that an unsatisfied term raised for the purpose of securing an annuity, may, during the life of the annuitant, be set up in an ejectment by the heir-at-law, though he only claim subject to such charge. This case was considered as furnishing the rule of law, and in Goodtitle dem. Jones v. Jones, B. R., M. 37 Geo. 3, 7 T. R. 43, it was held, that even a satisfied term, if it is outstanding, is a bar in ejectment, unless a surrender of it can be presumed. Shortly afterwards, in Doe dem. De Costa v. Wharton, B. R., M. 39 Geo. 3, 8 T. R. 2, the doctrine advanced in the principal case, that a lease to a tenant who is not intended to be disturbed shall not be set up, was overthrown. So in Doe dem. Shewen v. Wroot, B. R., E. 44 Geo. 3, 5 East, 138, Lord ELLENBOROUGH said, "As to the doctrine that the legal estate cannot be set up at law by the *cestui que trust*, that has been long repudiated." The rule laid down in the principal case, that a tenant shall not be allowed to set up the title of a third person in an ejectment brought against him by his landlord, has been frequently recognised, subject to this qualification, that though he may not deny the title of his landlord *in toto*, yet he may show that it has expired. Doe dem. Syburn v. Slade, B. R., E. 32 Geo. 3, 4 T. R. 682.

SCOTT v. NICOLL.

A. lends B. £60, and at the same time takes a note from B. at three months for £65 5s.; in an action for money lent, held that A. could not recover the £60.

THIS was an action of assumpsit tried at Guildhall, at the sittings after Hilary term, before Lord MANSFIELD, when the jury found a verdict for the plaintiff, with £60 damages, subject to the opinion of the Court on a case reserved.

The declaration contained the usual counts for money lent, money paid, money had and received, and on an account stated.

The case stated that the plaintiff lent the defendant £60, and on the trial proved the loan by witnesses, who, at the *same time, proved that the following note was given for it:—^[*315]

"Three months after date, I promise to pay to Mrs. Sarah Diana Scott, or order, sixty-five pounds five shillings, value received. 7th October, 1784.

"WM. NICOLL."

No part of the £60 had been repaid to the plaintiff, nor was the note ever negotiated.

The question was, whether the plaintiff was entitled to recover back the sum advanced.

Lane, for the plaintiff.—This case depends on the construction of the statute, 12 Anne, c. 16. The word contract in the statute means written instrument. In the time of Queen Elizabeth, when the first act against usury was made, written contracts were generally used in all loans. At common law usury was no offence. Here there has been no taking of usurious interest. *Fisher v. Beaseley*, B. R., T. 19 Geo. 3, ante, vol. i. p. 235. Here there is a contract distinct from the written security—a contract to repay the money actually lent.

Bower, for the defendant, was stopped by the Court.

Lord MANSFIELD.—This is too plain to be argued.

Judgment for the defendant.

SATTERTHWAITE, Widow, v. DEWHURST.¹ May 9.

No action will lie for debauching a daughter, though the mother maintain her and her child during her lying-in, unless on the ground of the loss of service.

RULE to show cause why the judgment in this case should not be arrested.

The declaration stated, that the defendant, contriving and maliciously intending to oppress, injure, and impoverish the plaintiff, unlawfully and injuriously seduced, debauched, and carnally knew one Mary Satterthwaite, who then and still was a poor person, and the daughter of the plaintiff, and then and there begot her with child, whereby she became sick and ill, and afterwards was delivered of the said child so begot by the defendant; by means of which sickness and delivery of the said child, the said Mary was for a long [316] space of time impotent and unable to work or maintain herself; *and the plaintiff being of sufficient ability in that behalf, was obliged during all that time to maintain the said Mary, her daughter so being poor, impotent, and unable to work or maintain herself as aforesaid, and therein necessarily laid out and expended a large sum of money, and underwent great trouble, fatigue, and anxiety.

Chambré, for the plaintiff.—I admit that trespass would not lie unless the daughter was actually the servant of the plaintiff, but it is otherwise with regard to an action on the case; for it is clear that the plaintiff has sustained consequential damage, and for that an action lies. A parent is bound by nature to maintain his child. *Dutton v. Poole*, B. R., M. 29 Car. 2, 1 Vent. 318, 332; *Hunt v. Wotton*, Exch. E. 31 Car. 2, T. Raym. 259; *Tullidge v. Wade*, C. B., E. 9 Geo. 3, 2 Wils. 18. The statute 43 Eliz. obliges the father and grandfather to maintain impotent children. Here it is alleged that the plaintiff was obliged to maintain her daughter, and if necessary the Court will intend that there was an order for that purpose.

Topping, contra.—The question is, whether the mother was under a legal obligation to maintain her child. There is no precedent of an action of this kind: all the forms state a loss of service. This action would do away with all the provisions made respecting bastards. There is no obligation on a parent but that which arises from the statute. *R. v. Munden*, B. R., T. 5 Geo. 1, 1 Str. 190. The daughter has reduced herself to want by her own criminal act. *Rippon v. Norton*, B. R., M. 43 Eliz., Cro. Eliz. 849. The obligation can only arise under an order of sessions, which is not averred.

Chambré, in reply.—The authority in *Strange* is only a *dictum* of Pratt, C. J. In *Rippon v. Norton*, it was averred that the son was not able to maintain himself.

Cur. adv. vult.

¹ A short note of this case, 5 East, 47 (n).

LORD MANSFIELD.—This is an action on the case for debauching the plaintiff's daughter, by means of which the daughter was unable to maintain herself, and the plaintiff was obliged to maintain her. After looking into the cases, we find that there is no precedent of such an action, unless upon a *quod servitium amisit*. The case of Russell v. *Corne, B. R., Hil. 2 [*317] Ann. 2 Lord Raym. 1031; Salk. 119; 6 Mod. 127, S. C., is in point. This is an action brought by a third person for the incontinence of two people, both of whom may possibly be of age; at least it does not appear that they are otherwise. We are all of opinion that this action cannot be maintained.

Judgment for defendant.¹

¹ See Postlethwaite v. Parkes, B. R., E. 6 Geo. 3, 3 Burr. 1878; Hall v. Hollander, 4 B. R., M. 6 Geo. 4, 4 B. & C. 660; 7 D. & R. 188, S. C.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

IN THE TWENTY-FIFTH YEAR OF THE REIGN OF GEORGE III.

CHIPPENDALL v. TOMLINSON and Another, Executors of TOMLINSON.¹ *May 31st.*

An uncertificated bankrupt may maintain an action for work and labor done by him, his assignees not interfering.

THIS was an action of assumpsit. The declaration contained two counts for business for the testator by the plaintiff as an attorney or solicitor; two for work and labor; and four for money paid, money had and received, money lent, and on an account stated.

The defendants pleaded (besides the general issue) that before and until the making of the promises in the declaration supposed to have been made by the testator, and from that time continually till the suing out of the commission of bankruptcy therein after-mentioned, the plaintiff and one Milne used the trade or profession of scriveners, receiving other men's moneys and estates into their trust and custody. The plea then went on to state a petitioning creditor's debt; that the plaintiff and his partner became bankrupts; a commission issuing; the adjudication of the commissioners, and two several assignments by them of the estate and effects of the bankrupts.

[*319] *The plaintiff replied (acknowledging that he would not further prosecute against the defendants as to the promises in the last four counts), that the business done as an attorney or solicitor, and the work and labor stated in the first four counts of the declaration, were done and performed after the issuing of the said commission, and also after the making of the said several assignments mentioned in the special plea, and for the necessary maintenance, support, and livelihood of the plaintiff and his family.

Rejoinder: That no certificate by which the said commissioners, &c., had, at any time before the exhibiting of the plaintiff's bill, been allowed by the Lord Chancellor.

General demurrer.

Chambré, for the demurrer.—There are two questions; 1st. Whether this

¹ S. C. reported without the arguments, 1 Cooke, B. L. 260, 1st edition.

debt has been assigned; 2dly. Whether it is capable of being assigned. The case of *Ex parte Proudfoot*, 1 Atk. 252, if well reported, seems to be contrary to the statute. It seems from the statute of Elizabeth (13 Eliz. c. 7), that there can be no assignment of future effects until they accrue. It does not say that they shall pass by the former assignment, but that they may be assigned. The rule with regard to real estate ought to govern with regard to personal estate. There is no case in which it has been held that subsequently acquired property passes by the assignment;¹ and, at all events, the assignment should contain words including the future effects. Until this debt is assigned, the property remains in the bankrupt, and the commissioners take no property. *Cary v. Crisp*, B. R., E. 1 W. & M., 1 Salk. 108.

Secondly, This is not a species of property capable of assignment. The statute of Elizabeth (13 Eliz. c. 782), section 2, only mentions "money, goods, wares, chattels, merchandises, and debts;" and the eleventh section, relating to subsequently acquired lands, &c., omits the word "debts." There are general *dicta* to be found, but there is no express decision in which the question as to debts has been determined. In *Evans v. Mann*, B. R., H. 11 Geo. 3, Cowp. 569, the bankrupt had sold a lighter which belonged to the assignees, which is very distinct from this case of the bankrupt's earnings after his bankruptcy. In **Martin v. O'Hara*, B. R., E. 18 Geo. 3, [320] Cowp. 823, a second commission had issued against the bankrupt, and it was held that he could not become a trader, but it was not determined that he might not acquire a debt. Certainly if he buys goods they will become the property of his assignees, but the Court will not extend that doctrine. In the statute 3 Geo. 2, c. 30, § 9, there is an exception of the tools of trade of the bankrupt; but to what purpose would it be to except them if he could not employ them for his own benefit? In *Ashley v. Kell*, B. R., E. 2 Geo. 2, 2 Str. 1207, it was held, that though the future effects of a bankrupt were liable to be seized for the benefit of creditors, yet that the bankrupt had in the mean time such a property in them as enabled him to transact and sell to a *bona fide* purchaser. If this action will not lie, no action whatever for labor can be maintained: the rule must extend to daily labor, and the bankrupt will be able to earn nothing for his support. The assignees do not interfere, but the defence is set up by the person who has profited by the bankrupt's labor.

Bower, contra.—The general principle is, that a man who becomes a bankrupt continues so until he obtains his certificate, and to pass his subsequently acquired effects no new assignment is necessary, nor in practice is ever made. *Ex parte Proudfoot*, 1 Atk. 252, is expressly in point. So it is said by Mr. Justice BLACKSTONE in his Commentaries, vol. ii. p. 485, that "the property vested in the assignees is the whole that the bankrupt had in himself at the time he committed the first act of bankruptcy, or *that has been vested in him since*, before his debts are satisfied or agreed for." The course of practice, following opinions like these, deserves great weight. The words of the eleventh section of the statute of Elizabeth (13 Eliz. c. 7), are, that if any goods or chattels shall descend, revert, or *by any means* come to the bankrupt, &c., and the bankrupt acts are to be construed liberally in favor of creditors, and strictly against the bankrupt. He ought, therefore, to show himself within the favorable exceptions of later statutes. It is true that the right of action remains in the bankrupt until the assignment, but here there is an assignment sufficient to pass the right of action. With regard to the distinction **between the second and eleventh sections of the statute* [321] of Elizabeth, could it be contended that a legacy would not pass

¹ See the observations of Lord Ellenborough in *Kitchen v. Bartsch*, 7 East. 60.

because the latter section mentions only goods and chattels? See *Ex parte Ansell*, 11 Ves. 208. The argument as to the necessary support of the bankrupt and his family does not apply in this case, for it appears that the work was done upon credit. If the debtor of the bankrupt cannot pay without being liable to pay over again, the hardship is upon him, and if he pays before the commission, with notice, he must pay over again. The case of *Evans v. Mann*, cited ante, p. 319, cannot be distinguished. There the lighter was made by the bankrupt after the assignment,¹ and the value of the materials worked up was increased by the bankrupt's labors.

Chambré, in reply.—The bankrupt laws are not to be extended beyond their natural and obvious meaning. Lord Hardwicke, in *Ex parte, Proudfoot*, makes a distinction between real and personal property for which there is no foundation, which impeaches the authority of the report. With regard to the legacy, it may be admitted that money in the actual possession of the bankrupt will pass under the words "goods and chattels." Money coming by bequest falls under a peculiar construction, and is certainly within the meaning of the act. As to credit, it must always be given, even to day laborers in a degree. [Lord MANSFIELD.—No case in point has been cited, though I have a loose memory of one at *Nisi Prius* in favor of the bankrupt. It is a question of great importance, and of terrible consequence if determined one way. For what is to become of the bankrupt if he cannot earn a maintenance by his daily labor? Let it be argued again next term.]

In this term the case stood for a second argument, but the defendant not understanding it so, no one appeared to argue it on that side.

Lord MANSFIELD.—The single question is, whether the assignees are entitled to the earnings of a bankrupt, and we are all clearly of opinion that they are not.

BULLER, Justice.—The case before Lord HARDWICKE does not go to the [*322] extent supposed. His lordship only says "all *his future personal estate is affected by the assignment," and that expression is explained by the case in *Strange* to mean no more than that the assignees *may* seize future effects. The clause in the statute 5 Geo. 2, as to the second bankruptcy, does not weigh at all in my mind.² Judgment for the plaintiffs.

¹ This does not appear from the report in Cowper.

² In the report in Co. B. L. Lord MANSFIELD adds, "The assignees cannot let out the bankrupt; they cannot contract for his labor."

³ In Mr. East's MS. note of this case, Mr. Justice BULLER is also reported to have said, "The bankrupt had an undoubted right to sue for the profits of his labor; but supposing a person in his situation should gain a large sum of money or considerable effects, then such money or effects would undoubtedly be liable to his assignees." 7 East, 58 (n). In the MSS. of LAWRENCE, J., a similar opinion is attributed to Lord Mansfield.

⁴ This case has been confirmed by a great number of later decisions. *Laroche v. Wakeman*, cor. Lord Kenyon, Peake, 140; *Silk v. Osborn*, coram Lord Kenyon, 1 Esp. 140; *Webb v. Fox*, B. R., T. 37 Geo. 3, 7 T. R. 391; *Fowler v. Down*, C. B., E. 37 Geo. 3, 1 B. & P. 44; *Cumming v. Roebuck*, cor. Gibbs, C. J., Holt, 172; *Clark v. Calvert*, C. B., H. 49 Geo. 3, 8 Moore, 96; 8 Taunt. 742, S. C.; *Drayton v. Dale*, B. R., M. 4 Geo. 4, 2 B. & C. 298; D. & R., S. C.

But if the assignees claim the property, or dissent to the bankrupt bringing the action, it cannot be maintained. *Hull v. Pickersgill*, C. B., T. 49 Geo. 3, 1 B. & B. 282; *Kitchen v. Bartsch*, B. R., M. 46 Geo. 3, 7 East, 53; *Nias v. Adamson*, B. R., M. 60 Geo. 3, 8 B. & A. 225.

A distinction appears to have been taken by Lord MANSFIELD, with regard to the profits arising from the personal labor of the bankrupt, to which he seems to have thought that the assignees were not entitled. Such also was the opinion of Lord ALVANLEY, C. J., "Can there be any doubt that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? *They cannot indeed take the profits of his daily labor. He must live.* But if he accumulate any large sum,

it cannot be denied that the assignees are at liberty to demand it." *Hesse v. Stevenson*, 3 B. & P. 578. Indeed in *Coles v. Barrow*, C. B., H. 58 Geo. 3, 4 Taunt. 754, it was held by *HEATH* and *CHAMBER, JJ.*, contrary to the opinion of *MANSFIELD, C. J.*, that where the assignees of an uncertificated bankrupt employed him in carrying on the business for the benefit of the estate, and paid him money from time to time, he might maintain an action against them for a reasonable compensation for his work and labor. *LAWRENCE, J.*, expressed an opinion during the argument adverse to the plaintiff, but before the judgment was delivered he had resigned. "If Mr. Justice *LAWRENCE* had continued in the Court of C. P. that decision would probably not have been pronounced. It is not therefore entitled to any great weight." Per *Barr, J.*, *Nias v. Adamson*, 3 B. & A. 282.

By the statute 6 Geo. 4, c. *16, 78, the commissioners shall assign to the assignees all the present and future personal estate of the bankrupt, and all [*323] property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to the bankrupt; and after such assignment neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, or to make any release or discharge thereof.

BUCKWORTH v. THIRKELL.¹ May 31.

Devise "from and after M. B. shall have attained the age of 21 years or be married, to M. B., her heirs and assigns. But in case the said M. B. shall happen to die before she arrives at the age of 21, and without leaving issue of her body; and from and after the decease of the said M. B. without issue as aforesaid, to J. S. B.," &c. M. B. married, had issue, and died under 21 without leaving issue. Held that her husband was entitled to courtesy.

ACTION of replevin tried before *ASHURST, Justice*, at the last Assizes for the county of Cambridge. Verdict for the plaintiff, subject to the opinion of the Court on the following case:—

Joseph Sutton being seised in fee of the premises in question, devised them by his will, bearing date the 22d of August, 1769, in these words, viz.

"Also I give, devise, and bequeath all and every other my real and personal estates of what nature or kind soever the same may be or consist of, to A. and B., their heirs and assigns, to and for the several uses, and upon the several trusts, and subject to the several provisos, conditions, and limitations as are hereinafter mentioned, that is to say, *First*, as to, for, and concerning all my estate at C., in trust that they the said A. and B., and the survivor of them, and the heirs and assigns of the survivor of them, shall and do receive the rents, issues, and profits thereof, and pay and apply the same to and for the use, maintenance, education, and clothing of my granddaughter Mary Barrs, until she shall arrive to the age of 21 years or be married; and from and after the said Mary Barrs shall have attained her age of 21 years or be married, I give and devise all my said lands and premises at C. unto the said Mary Barrs, her heirs and assigns for ever. But in case the said Mary Barrs shall happen to die before she arrives at the age of 21 years, and without leaving issue of her body lawfully begotten, then, from and after the decease of the said Mary *Barrs without issue as aforesaid, I give and devise all my said estates at C. unto my grand- [*324] son W. J. S. Barrs, and to his assigns for and during the term of his natural life," [with divers remainders over.]

The testator died about four years after the making his said will without revoking it. In the month of March, 1781, Mary Barrs, then being of about the age of 19, intermarried with S. Hansord. In March, 1782, a child was born of that marriage, which died on the 25th of August, 1782, and on the

¹ S. C., 1 Call. Jur. 382, but without the arguments on the second argument, more fully reported, 3 B. & P. 652 (n).

28th of the same month the mother, the said Mary Hansord, died under 21 years, and without leaving any issue. S. Hansord, after his marriage with the said Mary, and during the coverture, received the rents and profits of the premises in question in right of his wife. W. J. S. Barrs was the heir at law of the testator.

The question reserved for the opinion of the Court was, whether, under all the circumstances of this case and the events which have happened, S. Hansord was entitled by the courtesy to be tenant for life of the premises in question.

Wood, for the plaintiff.—The husband is not entitled to be tenant by the courtesy. In order to give a title to courtesy, the woman must be seised of an estate in fee simple or in fee tail, that is, of an unconditional estate in fee simple or fee tail. There are only two cases to be found applicable to this question. In *Sammes v. Payne*, K. B., M. 30 & 31 Eliz., 1 Leon. 167; Goulds. 81; And. 184; 8 Rep. 34, S. C., it was held that where the estate is determined by a limitation, there shall be courtesy, and it was distinguished from the case of a condition. It is there said that the estate was *spent and determined*, and was not *cut off*. Here the estate was defeated by a subsequent condition, and it is within the principle of the above cited case. So in *Boothby v. Vernon*, Can. E. 11 Geo. 1, 9 Mod. 150, it is said that wherever the estate is to be determined by express limitation or condition upon the death of the wife, the husband shall not be tenant by the courtesy. A case is put of a contingent remainder with a reversion in fee in the wife, and it is said that though in such case she be seised of an inheritance there shall be no courtesy. This shows that she must have an absolute estate. In *Boothby v. Vernon* the wife had a reversion in fee.

[*325] **Whitchurch*, contra.—The estate of tenant by the courtesy is created by operation of law. Litt. S. 35, 52. It is sufficient to entitle the husband that the wife was seised, though but for a moment. Co. Litt. 32 a; Br. Ab. Courtesy, pl. 14, 15. In *Boothby v. Vernon* the wife took an estate for life, and the issue would have taken by purchase. Here the subsequent words restrain the estate in fee only to an estate tail. This is a condition subsequent, and the estate once vested, which is sufficient. *Edwards v. Hammond*, 3 Lev. 132.

Wood, in reply.—It is not necessary to deny any of the positions cited from Littleton. The estate of tenants by the courtesy is certainly not derived out of the estate tail, for it takes place after the estate tail is gone. It is, in fact, a privilege to the husband. The estate vested, but it was to be defeated by a condition subsequent, and in order to entitle the husband to courtesy, the wife must have an indefeasible estate.

Lord MANSFIELD.—Let it be argued again, and add to the case who is the heir-at law of the testator.

Le Blanc, for the plaintiffs.—Since the case was last argued, an addition has been made to it, and it is now stated that J. S. Barrs, the devisee, was and is the heir-at-law of the testator. The question arises on the nature of the estate which the wife must have in order to entitle the husband to courtesy. Mary Barrs took an estate in fee simple defeasible, and there can be no courtesy unless the estate was absolute. The devise is to her in fee simple, and if she die under 21 and without issue, then the estate is to go over to the heir-at-law, who is also the devisee, and under whom the plaintiff claims. It is not the case of an estate spent and expired, but determined by condition. Two cases were cited during the former argument. *Sammes v. Payne* is reported in several books, upon the reasoning of which there is no tenancy by the courtesy in the present case. In *Boothby v. Vernon* the same doctrine is recognised both by the Court of Common Pleas and by the

Court of Chancery. These authorities also show that the rule, that wherever the issue may by possibility inherit, the husband shall have courtesy, is not universal, and that it does not apply to this case, which is an exception. So also in the case of joint-tenants. 2 Rolle Ab. 90.

*Courtesy resembles dower, and in general the same rules apply to both, though they differ with regard to the doctrine of actual seisin [*326] and of trust. Whether dower arises when the husband's estate determines by condition is doubted in Rolle, p. 676 (P); the Court being equally divided.

This question was argued on the former occasion very much on the general nature and definitions of this estate. In Littleton, Sec. 52, it is said that where the issue may by possibility inherit the same tenement of such an estate as the wife hath, as heir to the wife, in this case, after the decease of the wife, the husband shall have the same tenement by the courtesy. Now here the issue would not have taken such an estate as the wife had, for they would have taken a fee simple absolute. Tenancy by the courtesy is not altered by the statute *de donis*. Before that statute the estate tail became absolute on having issue, to three purposes: 1, it became subject to alienation; 2, to forfeiture; and, 3, it became descendable to the issue of a second marriage, though limited in what is now called special tail. These inconveniences are remedied by the statute *de donis*, but the courtesy of the husband of the first marriage is left as before. This appears by several authorities; 2 Inst. 333; Payne's Case, 8 Rep. 35 b, 36 a; Br. Ab. Estates, 71; Fitz. Ab.; Formedon, 339; Plowd. 241. The estate becoming absolute, the issue took the same estate, and this appears to be the true reason why there is courtesy in estates tail as well as in fee simple. But this is not an estate tail, it is a fee simple defeasible; so that the distinction taken in *Sammes v. Payne* is founded on reason when the old law is considered. The addition of the fact of who is the heir only shows who is to enter for the condition broken.

Wilson, contra.—It is admitted that Mrs. Hansord took a fee simple defeasible on condition, and the question is, whether that will prevent courtesy. At the time of the passing of the statute *de donis* this executory limitation would have been void; executory devises have been introduced since that period, but the incidents of old estates have not been taken away. Courtesy is out of the whole fee simple, and not out of the wife's estate, and therefore the reason given in Rolle as to the case of dower cannot be supported, for the husband's estate being ended does not prevent the *dower. That [*327] authority therefore deserves no regard, and, besides, the case was not determined. If the estate of the remainderman is subject to this burden, there is no good reason why the contingent estate should not in like manner be liable. Why should the one be more favored than the other? No adjudged case can be found to show that it should. *Sammes v. Payne* was decided in favor of the courtesy, and it is only from the reasoning there used that it applies as an authority on the other side. From Anderson, indeed, it seems to have been thought that it would have been the same in the case of a condition. It was at this time that executory devises began. Anderson appears to have considered it a conditional limitation, and that no entry was necessary. Then it was a mere determination of the estate; and that, as it has been shown, is no answer to the claim of courtesy. So if this be a conditional limitation, it is a determination of the estate; if it be a condition as known to the old law, then an entry is necessary, which puts an end to all mesne acts. A limitation has no relation back, but a condition relates back to the time of the condition broken. Lord Anderson, in Leonard, puts this case: If a feoffment be made to the use of I. S. and his heirs until I. D. hath

done such a thing, and then to the use of I. D. and his heirs, and the thing done and I. S. dieth, his wife shall be endowed. Now this, if law, is in point, and more express than anything which is said on the other side.

A fee simple conditional, before the statute, was entitled to courtesy, although the condition was not completely performed, so as to prevent the estate from going back to the donor by the death of the issue before the wife, yet there was courtesy out of the donor's estate. As to *Boothby v. Vernon*, the decision in that case is nothing to the purpose, for the wife never was seised in possession of the inheritance, which did not merge the life estate. That is the true ground which Holt, who was counsel, put it upon. With regard to the case put there, the son would take by purchase and not by descent from his mother; while here, there is no doubt that the issue would take by descent, and by possibility they might take the same estate, because if the mother lived till 21 the estate became absolute. This distinguishes [*328] it from the case of joint tenants, and shows that the argument* on the other side, founded on the 52 section of Littleton, does not apply.

Le Blanc, in reply.—Executory devises were certainly introduced for the purpose of effecting the intent of the testator, and they are not applicable to defeat that intent. In the present case there was no intent that the husband should take any estate, but the contrary, for the estate is to go immediately to the grandson.

It is only because formerly fee tail became by the birth of issue fee simple absolute, that courtesy is incident to it. The case put in *Leonard v. Anderson* is not law. If it were, it would give dower to the wife of the mortgagee, although the money was paid at the day, which is contrary to the authorities. *Sammes v. Payne* is an authority in point, because it was determined on principles accurately laid down. *Boothby v. Vernon* went on the same principles.

Lord MANSFIELD.—Courtesy existed long before the statute *de donis*. It is necessary that the wife should be seised of an estate of inheritance and that a child should be born. Estates were absolute or conditional, and there was courtesy in both. It was let in, though the estate of the wife was determined. It is not true that the estate on condition was absolute on the birth of issue; it was so only to a special purpose—that of alienation to prevent perpetuity. At common law it was only by condition that estates were modified. The statute of uses introduced other modes. There was great dread of perpetuities, and many cases were decided on that in the time of Queen Elizabeth, and therefore they defeated many remainders over. Afterwards they went the other way, and let in many limitations which were too loose. In the civil wars there were various new contrivances—trustees and executory devises, the limits of which are but lately settled, to a life *in esse* and 21 years, which I remember being argued. It has been contended that this is a condition: it is nothing like it; it is a contingent limitation to defeat the estate on the wife's death, just as if an estate tail. But how was it when she was alive? She had a fee simple, and such a one as the issue might have inherited, had they not been disappointed by death.

Postea to the defendant.¹

¹ This case has given rise to much discussion. Mr. Butler, in his notes to Co. Litt. 241, a note (4), after referring *to the earlier authorities, states the effect of them in [*329] these words, "It should seem that where the fee in its original creation is only to continue to a certain period, the wife is to hold her dower and the husband his courtesy after the expiration of the period to which the fee charged with the dower or courtesy is to continue, but that where the fee is originally devised in words importing a fee simple, or fee tail absolute and unconditional, but by subsequent words is made determinable upon some particular event, there, if that particular event happens, the wife's dower and the husband's courtesy cease with the estate to which it is annexed."

He then states that a different doctrine seems to have been laid down in *Buckworth v. Thirkell*, and he offers some observations which go to impeach the principle upon which that case was decided. In the case of *Doe v. Hutton*, C. B., H. 44 Geo. 3, 3 B. & P. 658, the attention of the Court was called to *Buckworth v. Thirkell*, and Lord Alvanley said, that "it occasioned some noise in the profession at the time it was decided." His lordship also referred to the comments of Mr. Butler, which he described as "worthy of attention;" but he distinguished the case then before the Court from that of *Buckworth v. Thirkell*, upon which he professed to give no opinion. Doubts have been also expressed by several text writers as to the authority of the principal case. Sugden on Powers, 267 (n), 1st edition; Park on Dower, 179.

On the other hand, that decision has been on several occasions recognised. It is confirmed by the case of *Goodenough v. Goodenough*, 8 Prest. Abstr. 372; and is recognised as law by Holroyd, J., in *Doe v. Timins*, 1 B. & A. 549. And in the late case of *Moody v. King*, C. B., H. 5 & 6 Geo. 4. 2 Bingh. 447, *Buckworth v. Thirkell* was fully confirmed and acted upon.

Neither in *Buckworth v. Thirkell* nor in *Moody v. King* was the case of *Sumner v. Partridge*, Can. 1740, 2 Atk. 47, cited.

The KING v. The Inhabitants of ST. MARY, LAMBETH.¹ June 1.

The consent of the first master of an apprentice, to a service under another master, is sufficiently expressed by his giving the apprentice a character as servant.

Two justices removed Frances Gill, single woman, from the parish of St. Mary, Lambeth, in Surrey, to the parish of St. Saviour, Southwark, in the same county. The latter parish appealed, and the Court of Quarter Sessions quashed the order of removal, subject to the opinion of this Court on the following case:—

*On the 16th of March, 1781, the pauper was bound apprentice, [*330] by indenture, for five years, to Joseph Cooke, of the parish of St. Botolph, London, with whom she continued a year and a half; when, having slept out all night, on her return, Cooke and his wife told her she was no longer their apprentice, and might go and look for another place, and gave her money to go to a register-office to hear of a place. After this she continued a week with her said master, when she agreed to hire herself as a servant to Mr. Harney, of the parish of St. Saviour, at 40s. a year. Mr. Harney came to Cooke and inquired after her character, which turning out satisfactory to him, he hired her on the above terms. In his service she continued to live nine months in the parish of St. Saviour, being then under the age of 21. When she left Cooke, the indentures were not delivered up nor cancelled, but Mrs. Cooke told her they were destroyed. This was not true as to both parts, for one of them was read in evidence. The pauper afterwards went to a friend's house at Lambeth, where she lived on charity, but not as a servant. From thence she hired herself as a servant to Mr. Leahey, in the parish of St. Stephen, Walbrook, London, at £5 a year, without the knowledge of Cooke, where she lived three months. During this time she visited Mrs. Cooke and informed her where she was, who said she was glad of it.

Bearcroft and *Bond* showed cause, and contended, 1st, That no settlement was gained by the service in St. Saviour's; 2dly, If there was, that a subsequent settlement was gained in St. Stephen, Walbrook. It is true that the indentures continued to subsist, but it must be shown that the service was performed under them *qua* apprentice, in order to which it is necessary to show an assignment from the first master, or some act amounting to an assignment. The mere knowledge of the master is not sufficient, but there

¹ S. C., 2 Bott, 452, 6th edition; Cald. 583.

must be a consent on his part which implies that he still considers himself as master. But in the opinion of this man the apprenticeship was at an end, so that he could not consent to the continuance of a service under it. It is not found that the master when he gave the character knew the purpose of the inquiry, or that the pauper was hired. There must be a consent to the particular service. A general consent to go into the world and get a service anywhere will not do. If it would, the general consent would go also to [*331] the subsequent *service in St. Stephen's Walbrook. The hiring, indeed, was without the knowledge of Cooke, but so was the hiring in St. Saviour's; and there is the knowledge of Mrs. Cooke afterwards, and her approbation. *R. v. Allhallows*, T. 9 Geo. 1, 1 Str. 554; 2 Bott, 406; *R. v. St. George*, Hanover Square, M. 8 Geo. 2, 2 Sess. Ca. 138; 2 Str. 1001; *Burr. S. C. 12*; *R. v. Kennington*, E. 30 Geo. 2, *Burr. S. C. 416*; *R. v. Tavistock*, E. 7 Geo. 3, *Burr. S. C. 578*; *R. v. Austrey*, H. 31 Geo. 2, *Burr. S. C. 441*; *R. v. St. Luke's*, T. 5 Geo. 3, *Burr. S. C. 542*; 1 W. Bl. 553; *R. v. Notton*, M. 9 Geo. 3, *Burr. S. C. 629*.

Lord MANSFIELD.—The indentures are not cancelled: they still subsist, and the power over the servant continues. The question is, whether the master has not consented? With what view was the inquiry made? It was that the pauper should be servant. He recommended her as servant.

BULLER, Justice, mentioned the case of *R. v. Ideford*, H. 16 Geo. 3, *Burr. S. C. 821*. It is absurd to say that the inquiry about the pauper's character was merely from general curiosity. It was evidently with a view to service, and the giving the character with that view was a consent.

Order of sessions quashed.¹

¹ See *Rex v. Ashby de la Zouch*, M. 58 Geo. 3, 1 B. & A. 116; *Rex v. Whitchurch*, E. 4 Geo. 4, 1 B. & C. 574. [It was not objected that the indentures being for five years were voidable by either party according to *Rex v. St. Nicholas*, Ipswich, *Burr. S. C. 91*, and consequently the master alone, without consent of the apprentice or delivery of the indenture, might put an end to the apprenticeship.] Note by Mr. Serjeant Wilson.

The KING v. The Overseers of the Poor of EYFORD.¹ June 1.

Though a place have only two houses, it may be a vill by reputation, and separate overseers may be appointed.

Two justices of the peace for the county of Gloucester appointed John Rayer and Silas Wells, "substantial householders of the village of Eyford" in that county, overseers of the poor of the village of Eyford, by a special [*332] order of *appointment, setting forth all the different duties of that office.

Those two persons appealed to the quarter sessions, when the order or appointment was confirmed; the case appearing to be (as stated for the opinion of this Court), that Eyford is an extra-parochial place, consisting at present of a mansion-house and a farm-house occupied by different persons, but both together, with the estate thereto belonging, of the yearly value of £600, the property of one person. Twenty-five years ago there was in the same place a cottage, now gone to decay, the site of which was, at the time of hearing this appeal, covered by a plantation. In 1727, the occupiers of the two present houses acted as overseers of the poor of the hamlet of Eyford, and, in 1748, William Wanley, the then owner of the estate and occupier of the mansion-house, acknowledged himself to be liable to maintain certain paupers belonging to the said hamlet, by a certificate duly allowed, and the paupers were accordingly relieved by his tenant residing in the farm-house

¹ S. C., 1 Bott, 38, 6th ed.; Cald. 542.

till within these 15 years, during the latter part of which time the estate in question came into the possession of Mr. Dolphin, who was a justice of the peace, and at his death left his widow in possession of the mansion-house, at which time there was likewise a widow in possession of the farm; and it is not till within these two years that there has been any substantial householder in Eyford qualified to serve as overseer. From 1769 to the present time, the returns of men qualified to serve in the militia have been made to the deputy-lieutenants, by the present occupier of the farm-house, who subscribed such returns as constable. The appellants are substantial householders occupying the said two houses.

This case was argued at great length in Hilary term last by Mr. *Bearcroft*, Mr. *Clifford*, and Mr. *Bragge*, in support of the order of sessions, and Mr. *Wilson* and Mr. *Lane* against it. Lord MANSFIELD said, I think it should be stated whether it is a vill by reputation. I am not satisfied with the reason that there are but two houses. Suppose a parish reduced to two houses. The case of *Denham v. Dalham*, Burr. S. C. 35, was not determined on that ground only. Lord HARDWICKE goes on all the circumstances, particularly on its being called a park, and Mr. Justice LEE puts it upon its not being a vill by reputation. I do not see why under the statute of Elizabeth there may not be an appointment of one overseer [*333] if there is but one substantial householder.

The case having been sent back to be restated, came up with the addition, "that Eyford was a vill by reputation." Mr. *Wilson* admitted that this was decisive against the rule, but Mr. *Lane* contended that the facts being before the Court, they would form their own judgment, and not adopt that of the justices.

BULLER, Justice.—There is a case on which the Court cannot form a judgment. They send it to the sessions to know whether the place is a vill by reputation. The sessions say it is, and that makes an end of it.

Order confirmed.

The KING v. MYTTON.¹ June 1.

An indictment for disobeying an order of sessions on an appeal against a conviction, for not giving a list of male servants pursuant to statute 21 Geo. 3, c. 31, need not state the proceedings before the justices, nor that the servant comes within the description in the statute.

THIS was an indictment against the defendant for not obeying an order of sessions, found at the quarter sessions for Shropshire, and removed into this court. After a verdict for the Crown, *Caldecott* obtained a rule to show cause why the judgment should not be arrested, and the case was now argued by *Couper* and *Leycester* for the prosecution, and by *Caldecott* and *Bower* for the defendant.

The indictment set forth as follows:—

The jurors, &c., present that at the General Quarter Sessions of the Peace held at the Guildhall at Shrewsbury, in and for the county of Salop, on Tuesday in the week next after the feast of the Epiphany, viz., the 13th of January, 24 Geo. 3, and in the year 1784, before A., B., C., &c., justices, assigned, &c., upon the appeal of John Faulkner, supervisor of excise, against the judgment bearing date the 1st of November, then and now last past, given by D. and E., two of his majesty's justices of the peace for the county of Salop aforesaid, upon an information and complaint bearing date the 20th of October then and now last, exhibited by the said Faulkner upon oath, as

¹ S. C., Cald. 586; 1 Bott, 428 (n), 6th edition.

well for his majesty as himself, to and before the said D. and E., and others [*334] their *fellow-justices, against the defendant, for neglecting to make out, sign, and deliver, or cause to be delivered, a correct list of the true number of male servants by him retained or employed, and to make payment for the same according to the statutes in such case made and provided, 21 Geo. 3, c. 31, whereby the said defendant incurred a penalty of £20; by which they, the said justices—(the said defendant appearing before them at the time and place appointed by their summons on the said information)—having examined evidence upon oath on the matter of fact arising on the said information, respecting the said defendant having neglected to insert the name of F., as one of his servants, in the list by him delivered to his majesty's officer of excise, and to make payment for him as a servant, did adjudge that the said defendant had not neglected, as was stated, or as in the said information was alleged, and did dismiss the said information and complaint, and did also adjudge, that the said F. was not a taxable servant; and upon reading the said information and judgment, and hearing what could be said by counsel and witnesses on both sides, the said court of General Quarter Sessions thought fit and did adjudge that the said defendant was guilty of the charge contained in the said information, and that the said defendant had thereby incurred the penalty of £20; but, in consideration of the circumstances of the case, and upon the prayer of the defendant's counsel, the said Court thought fit and did mitigate and lessen the said penalty to the sum of £5, being one-fourth of the said penalty, over and above the sum of £10, being the reasonable costs and charges of the officer in the prosecution of the said defendant upon the said information: and the said Court did further order "that the said defendant should forthwith, upon notice of that order, and demand thereof made, pay unto the said Faulkner the sum of £15, the fourth of the said penalty and the reasonable costs and charges of the said Faulkner in the said prosecution," and that it was ordered accordingly by the Court, as by the said judgment and order it doth and may appear, of which said judgment and order of the said court of Quarter Sessions, the said defendant, in the said order mentioned, afterwards, viz., on the 9th of February, in the said year, 1784, at S., &c., had due notice; and the said [*335] sum of £15, in the said *order mentioned, was then and there demanded of the said defendant by the said Faulkner; nevertheless, the said defendant, at, &c., afterwards, viz., on the said 9th of February, in the year last aforesaid, and continually afterwards, until the day of taking this inquisition, at, &c., unlawfully and contemptuously did neglect and refuse, and still doth neglect and refuse to comply with, obey, and perform the said judgment and order of the said court of Quarter Sessions, and to pay unto the said Faulkner the said sum of £15, the fourth of the said penalty, and the reasonable costs and charges of the said Faulkner, although the said defendant, after such notice of the said order, viz., on the day and year last mentioned, at, &c., was required so to do, in contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

Cowper and Leycester showed cause.—Three objections have been taken: 1. That the whole proceedings and judgment both of the two justices and of the sessions are only set out by way of recital. 2. That it does not appear that any offence was committed, inasmuch as there is no time of hiring mentioned. 3. That it does not appear that the servant was of a description within the act. The statement is sufficiently certain, and the allegation is as positive as it can be. The other two objections were for the courts below. They have decided upon the facts, and it is to be presumed that they had sufficient evidence to authorize them in so doing. All that it is necessary to

state in the indictment is, that the sessions made such an order. The merits of the order are not now in question.

Caldecott and Bower, contra.—There is no direct averment that there was an information or anything else necessary to support the proceedings; and though the rule has been relaxed in civil cases, it still exists in criminal cases, in which nothing can be intended. The time of hiring, which in part constitutes the offence, ought to have appeared, in order to give jurisdiction to the sessions, who refer to the judgment of the two justices, in which no time of hiring is mentioned. It may have been before the act, or the twenty days may not have expired. *R. v. White*, E. 22 Geo. 3, Cald. 183. The act does not make it an offence not to enter every servant retained, [*336] *but only servants of a certain description. It should, therefore, have appeared that the servants came within that description, which is necessary to give the Court jurisdiction. This omission is clearly fatal. *Hooker v. Willes*, B. R., H. 13 Geo. 2, 2 Str. 1126.

LORD MANSFIELD.—The foundation of the indictment is the order of the sessions, and nothing appears to show that they had not jurisdiction. It must be good till got rid of.

BULLER, Justice.—The ground of this indictment is the judgment of the Court of Quarter Sessions, which is positively stated. Nothing would have availed you at the trial but showing that the sessions had no jurisdiction; for we cannot by a side wind inquire into the decision of a court of competent jurisdiction. The cases cited do not apply. In *R. v. White* there was clearly no jurisdiction, and in *Hooker v. Willes* it was necessary to bring the day within the description in the statutes. Rule discharged.

The KING v. The Inhabitants of ST. SEPULCHRE.¹ June 8.

Q. Whether the declaration of the husband, who is dead, as to facts concerning his settlement, are admissible?

If the settlement depends on a written instrument, it must be shown that due inquiry has been made after the written instrument before parol evidence can be admitted.

SARAH TRUTH, the widow of Charles Truth, with her three children, Charles Truth, aged upwards of 15; Samuel, upwards of 14; and William, near 7 years, were removed from the parish of Birmingham, in Warwickshire, to the parish of St. Sepulchre, in London.

Upon this the last-mentioned parish appealed to the Quarter Sessions for Warwickshire, when the order of removal was confirmed, and the following facts stated for the opinion of this Court.

The pauper, Sarah Truth, was born in the parish of St. Luke's, Old Street, in the county of Middlesex, and about nineteen years ago married Charles Truth, who died about a year and a half ago. Some time before his death, he informed the secretary of the Lying-in Hospital, in the county of Middlesex, in his wife's presence and hearing, that he was before his marriage a written articulated servant *for two years to Richard Spital, in the Old [*337] Bailey, in the said parish of St. Sepulchre, and duly served him there two years under the said articles, the said service being completed before his marriage. That he worked at buckle-cutting, and received one guinea per week, and lodged and boarded in the house of his master, for which he paid 9s. per week. Richard Spital has been dead about twelve years. The pauper never saw the articles, nor were they produced at the hearing of the appeal, nor any evidence given of any inquiry having been made after them.

¹ S. C. 2 Bott, 383.

Bearcroft and *Morris* showed cause. The only question is on the admissibility of the evidence. It is not usual for this Court to enter into that question, or to interfere in a settlement case, after the evidence has been received at sessions, because other evidence might have been given. But this was good evidence, and it is an invariable rule to receive at all sessions evidence of what the father or husband said, when dead or run away, as to facts concerning the settlement, though not generally that he was settled. There are other exceptions to the general rule, that hearsay is no evidence. What a bankrupt says before an act of bankruptcy is evidence; as when he declares an intention to abscond, although he cannot be a witness to prove an act of bankruptcy. The master in this case had been dead twelve years, and there was no public repository where such agreements were kept, so that any inquiry after the articles now was idle. They cited *Rex v. St. Michael's in Bath*, 2 Bott, 459; *Rex v. East Knoyle*, T. 13 and 14 Geo. 2, Burr. S. C. 151.

Sylvester and *Gough*, contra.—The practice at sessions goes no further than to show that the widow may be examined as to what the husband said, and the cases cited only prove that when an instrument is lost, or from length of time presumed to be lost, parol evidence of it may be received. But the best evidence is in all cases required, and there cannot be one rule for Westminster Hall, another for one sessions, and a third for another sessions. Here the settlement depends on a written agreement, which is not produced, nor shown to be lost. The parish officers ought to have gone a step further, and inquired after the articles. But that inquiry is negatived, and therefore the evidence is not admissible.

*WILLES, Justice.—[Lord MANSFIELD was absent.]—The first [*338] question is whether the declarations of the husband were admissible. In general such declarations certainly are not, but the usage at sessions is not so strict, and the only case cited on the subject seems to show that the usage is so. The declarations of a bankrupt are only evidence as to the *quo animo*, and do not apply here. On this point I think the order might be supported. But it is not necessary to give an express opinion, because on the other point the case seems to be weak, for it is found that no inquiry was made after the agreement, and what is said in the case of *Rex v. St. Michael's, Bath*, is decisive to show that such an inquiry is necessary.

ASHURST, Justice.—There is no occasion to give an opinion on the first point: not that I should have any difficulty concerning it. On the second point there is no rule better established than that the best evidence must be given. There were places here where an inquiry might have been made. The master's executors might have been applied to, or if on inquiry it appeared that he had none, that might have been sufficient.

BULLER, Justice.—I am of the same opinion. The presumption is that there were two parts of this agreement, but it is not even inquired whether the pauper had left any papers. Although it may be probable that the agreement would not have been found, yet an inquiry after it must be shown. As to the first point, what has been said of the declarations of a bankrupt does not apply. In the case of *St. Michael's, Bath*, it was an examination before justices, and in *Rex v. East Knoyle*, the facts were found, and the Court took them as found. Order quashed.¹

¹ The question as to the admissibility of the declarations of the husband arose in the case of *R. v. Eriawell*, T. 30 Geo. 3, 3 T. R. 707, when the Court were equally divided, Mr. Justice BULLER and Mr. Justice ASHURST being of opinion that the evidence was admissible, and Lord KENYON and Mr. Justice GROSS that it was inadmissible. But in the subsequent case of *R. v. Nuneham Courtenay*, E. 41 Geo. 3, 1 East, 373; *R. v. Ferry Frystone*, M. 42 Geo. 3, 2 East, 54; and *R. v. Abergwilly*, M. 42

Geo. 3, 2 East, 68, it was held that such evidence was not admissible, and the point was considered to be at rest. See also *R. v. Chadderton*, M. 42 Geo. 3, 2 East, 27.

On the second and principal point, this decision has been confirmed by various cases. **R. v. Castleton*, E. 85 Geo. 3, 6 T. R. 236; *R. v. Morton*, E. 55 Geo. 3, 4 M. & S. 48; *R. v. Mary-le-bone*, T. 5 Geo. 4, 4 D. & R. 475; *R. v. East Fainleigh*, E. 6 Geo. 4, 6 D. & R. 147; *R. v. Denio*, M. 8 Geo. 4, 7 B. & C. 620; *R. v. Stourbridge*, E. 9 Geo. 4, 8 B. & C. 96; 2 M. & R. 43, S. C. [*339]

COOPER and Another v. BOOT.¹ June. 9.

An officer, acting under a warrant granted by commissioners of excise, under stat. 10 Geo. 1, c. 10, is not liable as a trespasser, although no goods are found, nor is it necessary for him to prove that he had reasonable grounds of suspicion.

Boot brought an action of trespass in the Court of Common Pleas against Cooper and Cameron, and declared against them, for breaking and entering his house in the parish of St. James, Westminster, and staying there without his license, and against his will, and for breaking the doors, latches, and hinges, and entering, searching, and examining the several rooms of his said house.

Plea—"Not guilty."

The cause was tried before Lord LOUGHBOROUGH, at Westminster Hall, when the jury found a special verdict, of which the following is the purport:

Boot was a dealer in tea in the parish of St. James, Westminster, and his house was situate in that parish within the limits of the chief office of Excise in London. Cooper and Cameron were officers of the Excise, and for the duties upon tea. On the 29th of January, 1783, two of the Commissioners of the Excise, and for the duties upon tea—upon oath made before them by Cameron that he had cause to suspect and did suspect, that tea was fraudulently hid and concealed in or about Boot's house, with intent to defraud the king of his duties thereon, setting forth in the said oath the ground of his suspicion,—granted a warrant under their hands and seals, which set forth *in hæc verba*, by which, after reciting the oath of Cameron, and that the ground of suspicion appeared to them reasonable, they, by virtue of the power and authority to them given, *did adjudge it reasonable*, and authorized and empowered him to enter into all and every room and place in and about the house, and the outhouses thereunto belonging, and to seize all such tea and other goods liable to the duties of *excise, or inland [*340] duties upon coffee, tea, &c., as he should find so fraudulently hid and concealed, as forfeited for his majesty's use, together with all the casks and other vessels and things, wherein the same should be contained; and they thereby authorized all constables and other his majesty's officers to be aiding and assisting him in the execution thereof, for which the same should be to them and every of them a sufficient warrant. In pursuance of, and under this warrant, and for the purposes therein mentioned, Cameron, and Cooper in his aid and assistance, on the said 29th of January, entered the said house of Boot in the warrant mentioned, without his consent, and rummaged the same, and in order to enter the several rooms and places, parcel of the house, for the purposes mentioned in the warrant, broke open several locks with which such rooms and places were fastened, Boot refusing to open the same. They found no tea nor other goods fraudulently hid or concealed.

Upon this special verdict, judgment was given in the Court of Common

¹ S. C. 8 Esp. 85.

Pleas for Boot, upon which *Cooper* and *Cameron* brought a writ of error, and assigned the common errors.

Wood, for the plaintiff in error.—The question intended to be now raised was not argued in the Court of Common Pleas, because in *Bostock v. Saunders*, O. B., T. 13 Geo. 3, 2 Black. 912; 3 Wils. 434, S. C., that Court had decided the same question against the plaintiff in error. It is intended to reconsider the grounds of that decision.

The question arises on the statute 10 Geo. 1, c. 10, which gives a duty on coffee, &c., and requires an entry of the dealer's house. The twelfth section gives the power of entering in the daytime. The thirteenth section is the clause in question, and it enacts, That in case any officer or officers shall have cause to suspect that any coffee, &c., shall be fraudulently hid or concealed in any place whatsoever, &c., with an intent to defraud his majesty, then, upon oath made by such officer before the commissioners, &c., setting forth the ground of his suspicion, it shall be lawful for the commissioners, &c., if they shall judge it reasonable, by special warrant under their hands and seals, to authorize and empower such officer or officers by day or by night, but if in [*341] the night-time, then in the presence of a constable, &c., *to enter into all and every such place or places where he or they shall suspect such coffee, &c., to be fraudulently hid or concealed, and seize and carry away such coffee, &c. Under this clause the officers are justified, though no tea be found. The statute gives the authority "in case the officer *shall have cause to suspect*," and the finding of the tea is no part of the condition. It would be inconsistent if the act gave them a power of proceeding in case of reasonable suspicion, and at the same time made them trespassers on a subsequent event. The statute means to empower the officers to act on a reasonable ground of suspicion, and the certainty of the fact is not necessary to be known previous to the obtaining the warrant. Any mischief to the subject is guarded against by the statute requiring the application to a commissioner or a justice of the peace, and that the informer should state the ground of his suspicion upon oath. Upon this the commissioners may grant "a special warrant," which it is the duty of the officer to execute. The officer then acts under the sanction of a superior jurisdiction, and in conformity to the judgment of such jurisdiction. It may be admitted, that if the officer in execution of the warrant does any act not necessary for the purposes of the warrant, he would be a trespasser, and that if he should lay a false and malicious ground for obtaining the warrant, he would be liable to an action on the case. But the present question is different: viz., Whether he becomes a trespasser by the subsequent event of not finding prohibited goods, which he suspected to be concealed. He is authorized to apply for a warrant on a reasonable ground of suspicion: therefore the true and simple point is, whether he had such reasonable ground at the time when he applied for the warrant?

If the person suspected should afterwards convey away the goods, it would be hard indeed to make the officer a trespasser, because he did not find them on the premises. Suppose, again, that the officer is resisted, so that he cannot make the search, though it cannot be known whether the goods are there or not, yet the party resisting is liable to a penalty; can it be contended that he is, notwithstanding, entitled to recover in an action of trespass?

When a man, on a charge of felony, obtains a warrant from a justice, and [*342] it appears that the party charged is *innocent, no action of trespass will lie. It must be a different action grounded on the malice. In *Bostock v. Saunders*, one of the arguments was that the Excise officer was the person who procured the warrant, and that therefore it should be no justification to him, unless the goods were found; and Lord Hale (P. C. 151) was cited, who says: "If the goods be not in the house, yet it seems that

the officer is excused that breaks open the door to search, because he searcheth by warrant, and could not know whether the goods were there till search was made; but it seems that the party that made the suggestion is punishable in such case:" but it is not said how he is punishable, nor is any authority cited. The warrant in this case was also assimilated to the writ of assistance. That writ is mentioned in the 13 & 14 Car. 2, c. 11, s. 5. It is a general writ to all officers and magistrates whatsoever, &c., commanding them to permit Custom-House officers to search, &c., and commanding them to assist. A Custom-House officer never applies to a magistrate or commissioner of the Customs for any further authority. The Excise officer is in a different situation. By the statute of 10 Geo. 1, he must lay his ground of suspicion before a commissioner or a magistrate upon oath, and does not act by his own authority merely, which the Custom-House officer does. The Court of Common Pleas seem to have mistaken the nature of the writ of assistance. They confounded it with the writ which is given by the statute 12 Car. 2, c. 19, s. 1. There is no determination that an officer, searching under the writ given by the latter statute, would not be justified. If a felony has been committed, any one may justify arresting an innocent person on reasonable suspicion. *A fortiori*, in the present case, the officer, being directed by law to proceed on reasonable grounds of suspicion, is justified.

Plumer, contra.—There is a preliminary question, whether it is necessary to go into any argument. A case has been decided which has been acquiesced in ever since, and many actions have been brought upon it. [Lord MANSFIELD.—It never was acquiesced in; and Westminster Hall was much divided on it. There have been cases determined against it. My opinion at the time was, *that under a writ of assistance you must find the goods, [*343] but not under a warrant. ASHURST, J.—It certainly was not understood to be a settled point. Wood.—A case was tried before Buller, J., at Oxford, when he gave his opinion that the warrant was a justification, and advised a special verdict, but the plaintiffs would not consent. Lord MANSFIELD.—When a felony has been committed, any person may arrest on reasonable suspicion. When no felony has been committed, an officer may arrest on a charge.] *Bostock v. Saunders* is at least entitled to be considered as an authority. On the special verdict there is no probable cause. [Lord MANSFIELD.—There are the oath and warrant, which are proofs of probable cause till you show the contrary.] If anybody had seen the goods carried off, or any probable ground of suspicion had appeared on the special verdict, it might have been sufficient. It is not necessary to argue that the finding of the goods is absolutely necessary, but it should appear what the particular ground of the officer's suspicion was, in order that the Court may judge of the reasonableness of the suspicion. The officer only says that he did suspect and had cause to suspect, but he does not show what cause. This was the ground of the decision in *Bostock v. Saunders*. The Court there did not say what might have been their determination if the grounds of the officer's suspicion had appeared. The judges in that case take notice that no evidence was given at the trial of any probable cause or ground of suspicion that tea was fraudulently concealed by the plaintiff. GOULD, J. (in the report in *Wilson*, which is the fullest), says, "No evidence was given of the ground of the defendant's suspicion; he ought to have shown to the Court and jury the cause of his suspicion. Suppose the defendant had been obliged to have pleaded specially; I think he could not have justified under the warrant alone, but must have pleaded the facts upon which he grounded his suspicion." [ASHURST, J.—Officers are never called upon to tell their information. Lord MANSFIELD.—The act puts a confidence in the commissioners and the justices. They have the grounds of the suspicion before

them. BULLER, J.—In the Exchequer, officers are never permitted to be asked what their information is.] Arguments of convenience are as strong on the other side. The security of the subject was thought by the Court of [*344] Common Pleas to be deserving of some consideration. The *commissioners have only the oath of the officer. They must believe him, though it may be all false. The judgment of the commissioners is no security, for it rests on the veracity of the officer. The subject will have no opportunity of ever contradicting the officer by evidence. All officers execute warrants at their peril, though they are bound to obey. When they are protected, it is because they have no means of ascertaining the truth, but must rely on the judgment of the magistrate. Whenever a warrant is executed by a party at whose suit it is, he is obliged to show the grounds of his proceeding. So, in all cases of a limited jurisdiction, it must be shown that the jurisdiction did not exceed its authority. In case of a judgment, the sheriff is justified as against a party by the writ. As against a third person, he must show the judgment, and the party must always show the judgment. *Hale* takes a distinction between a party making the suggestion, and an officer. The officer is excused, though no goods be found, but the party making the suggestion is punishable. In effect he says *how* punishable, by saying that it is lawful or unlawful according to the event. That means that it is a trespass, and subject to an action.

The statute 12 Car. 2 gave a power to the Barons of the Exchequer, or chief magistrates, to grant a warrant empowering a constable in the daytime, but if no goods are found, the statute makes the informer liable. The writ of assistance is a positive command, though general, like hue and cry; but that writ is no protection.

There is a distinction between general jurisdictions and particular authorities. Commissioners are to be watched and confined within their jurisdiction by the superior Courts, and must always bring themselves within the Act of Parliament which gives them their authority. Thus persons acting under a commission of bankrupt must show all their proceedings. In *Nichols v. Walker*, B. R., H. 10 Car. 1, Cro. Jac. 394, in trespass, a special verdict was found that the defendants were churchwardens and overseers of the poor, and that they acted under a warrant, &c.; and it was contended that although the rates for which the warrant was granted might be bad, yet the defendants, acting as officers under the warrant, were excused; but the Court said [*345] that the rate being unduly *taxed, the warrant of the justices for the levying thereof would not excuse, and that it was not like where an officer makes an arrest by warrant out of the King's Court, which, if it be error, the officer must not contradict, because the Court has the general jurisdiction; but that here the justices of the peace have but a particular jurisdiction, to make warrant to levy rates well assessed. So, in the case of — *v. Boucher*, B. R., M. 3 Jac. 1, Cro. Jac. 81, the defendant justified as sergeant-at-mace under the command of the mayor, but did not show the cause of the imprisonment which was objected to, and the Court held the plea bad, for that, when one is implicated in an action, he ought to show the cause.

The statute upon which the defendant rests his defence requires that there should be a reasonable ground of suspicion. If he had been compelled to plead specially, he must have stated in his plea that he had cause to suspect, an averment which would have been traversable, for if there had been no cause to suspect, the jurisdiction failed. The giving the special matter in evidence under the general issue can make no difference. This is the case of a party applying for an authority, for it is more an authority than a warrant, and he enters at his peril. It is similar to the petition of a creditor under a

commission of bankrupt, who is answerable for all the consequences. Again, this being a process under a limited jurisdiction, the defendant must show himself within the express words of the statute which confers that jurisdiction, and which requires, before it confers any power, that a reasonable ground of suspicion should exist. Lastly, trespass is the proper form of action, as appears from all the cases. An action on the case would be improper. The injury consists in the breaking and entering, and if there is any remedy, it must be by action of trespass, and that action, if maintainable at all, is maintainable against the informer. [LORD MANSFIELD.—Mr. *Plumer* has put it on this, whether there was probable cause or not, which is much more sensible and consistent than putting it, as the report does, on found or not found.]

Wood in reply.—As to Mr. *Plumer's* first point, that it does not appear on the special verdict that the jury found any reasonable grounds of suspicion, is it necessary by the statute that it should? Who is to judge whether there *were sufficient grounds?—the commissioners or justices, and [*346] not a jury. The jury are not to try this point; they have only to inquire whether or not the justices were satisfied that there were grounds,—that, acting within their jurisdiction, they granted the warrant. It was then argued, from inconvenience, that it was of alarming consequence that such a power should exist. That objection only goes to the statute which reposes a confidence in the justices, which, if abused, may probably subject them to an action, certainly to an information. [WILLES, J.—How could that be without seeing the information given?] On proper grounds the Court would order the information to be produced. The cases cited are not applicable. It is said that a party must show a judgment. This is like a judgment. It is a decision by a magistrate. As to the case in *Croke Charles*, it was a rate on a part of a parish that was extra-parochial. It was therefore out of the limits of the jurisdiction, and does not apply unless this was out of the local limits of the commissioners of Excise. In the case in *Croke James*, the plea stated “divers causes,” without alleging any in particular, which was clearly bad, and so here it would have been bad if it had been stated “on divers suspicions;” but the special verdict has followed the very words of the act of parliament. It is objected that it ought to have been stated that the person applying to the magistrate had cause to suspect, and that this would have been traversable, and might have been tried by a jury; but the true meaning of the act of parliament is not that this question should be tried by a jury, because it says that the magistrate shall judge. The only question therefore would be, whether the magistrate issued his warrant upon oath made, setting forth the ground of suspicion. Now it appears on the special verdict, that the warrant was issued upon oath made that the officer had cause to suspect, and did suspect, setting forth in the said oath the grounds of his suspicion, which is all that the statute requires. It has been said unless trespass will lie, no action can be maintained; but if a legal act be done from malicious motives, it is the subject of an action on the case, and not of an action of trespass.

LORD MANSFIELD.—We will think of it.

On a subsequent day his lordship desired to be informed whether the *dictum* of Lord HALE, that the justification under *a search-warrant depended on finding the goods, had been followed by any decision. [*347] He added, that Lord HALE said it doubtfully, his words being “it seems,” and it was in a work published after his death. He also desired to know whether the writ of assistance was not founded entirely on the statute of Charles II., and framed from the general directions of that act. He desired that an inquiry might be made into these two points, and said that the

Court, in order to give time for it, would defer the judgment till the following term.

In the course of that term, *Plumer* informed the Court that he had found other passages in Lord HALE confirming the doctrine in p. 151, viz., pp. 113, 116, 117. He also referred to 4 Inst. 177, 178. There are also several authorities as to searching for a felon, where the justification depends on the finding him. The cases on warrants are few, because the constable was a conservator of the peace, and wanted no warrant. Lord COKE treats the warrant as only in aid, but Lord HALE narrows that doctrine, p. 212; Hawk. 84; 2 Inst. 52. There are precedents of pleadings in actions against informers, in which the pleas set out the probable cause. With regard to the writ of assistance, it is said to be founded on the statute, but it seems to be copied from the sheriff's patent of assistance. [Lord MANSFIELD.—It may be copied, but did it exist independently of the statute?] There was a case of *Shipley v. Redmain* in the Common Pleas, T. 5 Geo. 3, before Lord CAMDEN, on a writ of assistance, when it was considered to be settled law that a person acting under the writ, and finding nothing, was not justified. There is also the case of *Entick v. Carrington*, C. B., M. 6 Geo. 3, 2 Wils. 291, 19 St. Fr. 1030, 8 C. As to searching for felons, the justification seems in some cases to depend upon the event. 1 Hale, 582; 2 Hale, 116, 117.

Lord MANSFIELD delivered the judgment of the Court. This case comes before the Court by writ of error on a judgment in the Common Pleas on a special verdict. It appears to be exactly the same with that of *Bostock v. Saunders*, and the Court of Common Pleas in this case gave judgment on the authority of that decision, without hearing any argument. The great [*348] weight which the *opinion of those who gave judgment in this case carries with it has made us deliberate, and turn the matter over and over again in our minds, but we cannot bring ourselves to coincide in the judgment of the Court of Common Pleas. We think the Excise officer cannot be guilty of a trespass, either in procuring or executing the warrant. If it was either procured or executed maliciously, from corrupt motives, he may be liable in a special action on the case. The question depends upon the statute 10 Geo. 1, c. 10. By that act, a duty is imposed on an officer of Excise who has grounds of suspicion, to lay such grounds before a commissioner of Excise, or a justice of peace upon oath. A duty is also imposed on such commissioner or magistrate to exercise his judgment on the grounds of suspicion so laid before him, and if he thinks them sufficient, and not otherwise, he is bound to grant a warrant to search. The judgment of the magistrate upon an *ex parte* examination, certified by oath, is made decisive by the statute. There cannot be a doubt but that the commissioners of Excise had an authority in this case, that the warrant was clearly legal when it issued, that the execution of it was legal, and that the warrant, therefore, was legal when executed. It is a solecism to say that the regular execution of a legal warrant shall be a trespass. If improperly executed, an action on the case will lie.

Two objections were taken:—First, that the event of not finding avoids the warrant, and makes the officer a trespasser by relation. This objection, if allowed, would in effect repeal the act of parliament, which is adapted to cases of probable suspicion, and requires probable circumstances to be stated to the commissioner or justice. The officer does not say that he knows prohibited goods are in the house. In justifying an arrest for felony, reasonable suspicion is sufficient, and it is not necessary that the person suspected should be found guilty on the trial. See *Beckwith v. Phelley*, B. R., E. 8 Geo. 4, 6 B. & C. 635. The case of the writ of assistance is not applicable.

There there is no warrant, and all is left to the discretion of the officer; besides, which is very material, there is a positive clause in the statute of Charles 2, which makes the whole depend on the actual finding of *goods. [349] Suppose a warrant issues to search for stolen goods. This perhaps may depend on the event of finding the goods. That, however, is a politic prevention to avoid abuse; but on this point we give no opinion. The act under which the warrant in the present case issued is made for the benefit of the public, and it is for their benefit that the parties may proceed safely on reasonable grounds. The check to the abuse of this warrant is the judgment of the magistrate. Suppose goods were actually in the house, and that they were taken out just before the warrant was executed. Can it be said that the officer in that case would be a trespasser? It would be adding to the statute a clause which the legislature, with the statute of Charles II. before their eyes, have purposely avoided.

But supposing it too much to say that the statute meant that the validity of the warrant should abide the event of the finding, then the second objection is that the grounds of probable suspicion must be made to appear to the jury who try the cause. This equally repeals the act. The officer alone may know the facts. To remedy the inconvenience which must follow from his making this knowledge public, the oath of the officer is made evidence of the fact, and the fact itself is left to the magistrate to judge of. The granting of the warrant is made evidence of the suspicion, whatever the event may afterwards be; otherwise too much would be left to the jury, and no officer would be safe. If the magistrate thinks there is sufficient ground, he is bound to grant the warrant; if insufficient, to refuse it. The regulations made by the act are agreeable to the principles of justice and policy. The officer is not a party, though he is interested. He acts as a public officer, and in the execution of his duty; if he acts *bonâ fide*, he ought to be safe. It is not left to his discretion to search, he is bound to do it, nor must he stay to consider whether or not he can find witnesses to prove the grounds of suspicion to the satisfaction of a jury. The statute has chalked out a way by which he may be safe. He must make oath, and he will then obtain a warrant. Whenever an officer acts *malâ fide*, this act will not protect him, and he may be sued in a special action on the case. That course, however, has not been adopted here. We are all of us therefore of opinion, though against great authority, that for the due *execution of a legal warrant the officer cannot be made a trespasser. Judgment reversed. [350]

¹ There are several modern decisions in which the point, as to the justification of the officer depending on the fact of the goods or the person being found, has come in question. *Cooke v. Birt*, C. B., M. 45 Geo. 3, 5 Taunt. 765; *Ratcliffe v. Barton*, C. B., M. 43 Geo. 3, 8 B. & P. 223; *Johnson v. Leigh*, C. B., T. 55 Geo. 3, 6 Taunt. 246.

The KING v. COTTRELL. June 8th.

An inhabitant of a parish is a good witness on a conviction under 5 Anne, c. 14, for keeping a lurcher to kill game, if it do not appear that he is an inhabitant paying scot and lot; and the Court will not presume that he is such an inhabitant. When the information was for keeping two lurchers and the conviction for one, the conviction is good.

THIS was a conviction, by a justice of the peace, of Henry Cottrell, of the parish of Tadley, in the County of Southampton, for keeping and using a certain dog called a lurcher, to kill and destroy the game.

The record stated, that the justice had convicted the defendant on the

oath "of one credible witness, to wit, Henry Tull, of Tadley aforesaid, laborer."

Milles objected that the conviction was on the evidence of an inhabitant who was no witness. *R. v. Stone*, B. R., M. 2 Geo. 2, 2 Lord Raym. 1545, 1 Sess. Ca. 378, S. C.

BULLER, Justice.—It has been settled that an inhabitant not paying scot and lot is a witness. I remember a case before BURLAND, B.,¹ to that effect, which was I believe the first, the old cases being as Mr. *Milles* has stated. The decision of Mr. Baron BURLAND was universally approved of. We cannot presume anything, and, therefore, nothing being said about it, we will not presume that this man pays.

Milles then made another objection, that the information was for hunting with two lurchers, and the conviction for one, which, he said, was not sufficient notice to the defendant what he was to answer.

BULLER, Justice.—It is the same offence, though not to *the same [*351] extent, and the justice fixes the offence to the time mentioned in the declaration.

WILLES, Justice, of the same opinion.

Conviction affirmed.*

¹ Cited and approved of by Lord ELLENBOROUGH, 2 East, 561.

² This decision on the point of evidence has been frequently confirmed. *R. v. Kirdford*, T. 42 Geo. 3, 2 East, 559; *R. v. Killerby*, M. 49 Geo. 3, 10 East, 298. See also *Rhodes v. Ainsworth*, M. 58 Geo. 3, 1 B. & A. 87.

GREY v. CUTHBERTSON and Another, Assignees of MILLS. June 9th.

Covenant by lessor against assignee of lessee, on a covenant by the lessee, for himself, his executors and administrators, to pay to the lessor the amount of fruit-trees, &c., to be planted by the lessee according to an appraisement to be made by two persons, one to be chosen by each of the parties. Breach that the defendant refused to name a person to make the appraisement. Demurrer. Held that this covenant did not run with the land, and that the assignee was not bound.

THIS was an action of covenant. The declaration stated that Mills, being possessed of certain premises at Leeds, in Yorkshire, for the residue of a term of which more than fourteen years were then unexpired, demised those premises, by indenture, on the 22d of September, 1770, to the plaintiff, his executors, administrators, and assigns, for a certain rent, and other considerations, to hold him, his executors, administrators, and assigns, from the 11th of November then next to come, for fourteen years: that it was, by the said indenture, declared and agreed by and between the parties, that, at the expiration or sooner determination of the lease, a fair appraisement should be made by two indifferent persons (one to be chosen by each of the parties, or their respective executors), of all the fruit-trees and bushes that should be then standing and growing on the premises, and should have been planted by the plaintiff, his executors, administrators, or assigns; and that the plaintiff, his executors, administrators, or assigns, should deliver up such trees and bushes to Mills, his executors, administrators, and assigns, at the appraisement to be so made; and that Mills, for himself, his executors and administrators, by the said indenture covenanted with the plaintiff, his executors, administrators, and assigns, to pay to him or them immediately after such appraisement such sum as such trees and bushes should be valued at; that the plaintiff, by virtue of the lease, entered on the premises, and became possessed thereof, the reversion being in Mills for the residue of his term: that afterwards the premises and all the estate, right, title, interest,

and term of *years of Mills therein, by assignment came to and vested in the defendants, and they became possessed thereof and of Mills's [*352] reversion in the same: that the plaintiff continued in possession till the end of his lease, which expired by lapse of time on the 11th of November, 1784, when he quitted and yielded up the possession, together with the trees and bushes thereon growing, to the defendants as such assignees; that although the plaintiff had from time to time performed and observed everything in the lease contained on his part to be performed and observed; yet (protesting, &c.) the plaintiff in fact said, that in every year during the continuance of the lease divers large quantities of fruit-trees and bushes of great value were planted by him on the premises, and remained standing and growing there at the expiration thereof, of which the defendants had notice: that the plaintiff at the expiration of the lease was desirous that a fair appraisement should be made of the trees and bushes, according to the form and effect of the lease, by two indifferent persons, one to be chosen by him and the other by the defendants, then being such assignees: that he was willing to choose, and did choose one A. B., being such indifferent person, of which the defendants had notice; and that they were then requested by the plaintiff to choose another, yet they did not nor would choose any indifferent person to make with the said A. B. such appraisement, but wholly omitted and refused so to do: by reason whereof no fair appraisement could be made according to the form and effect of the lease, and of the covenant in that behalf made; and that the plaintiff was yet wholly unpaid and unsatisfied for the said trees and bushes.

General demurrer.

Clayton, for the demurrer.—This is not such a covenant as runs with the land and extends to the assignee. It is only where a covenant extends to a thing *in esse*, parcel of the demise, and is *quodam modo* annexed and appurtenant to the thing demised, that it binds the assignee where he is not named. *Spencer's case*, B. R., E. 25 Eliz., 5 Rep. 16; *Bally v. Wells*, C. B., M. 10 Geo. 3, 3 Wils. 25, *Wilmot's Cases*, 341, S. C. But if the assignee be named, and the covenant relate to a thing to be done upon the land demised, though the thing be not *in esse*, the assignee is bound. *Id.* If the covenant is merely *collateral to the land, and does not touch or concern [*353] it in any manner, then it cannot run with the land, and will not bind the assignee, though he be named. *Id.* Now, in the present case the thing to be done is perfectly collateral to the land, viz., to name an arbitrator; and the covenant related to a thing not *in esse*, viz., the value of fruit-trees which might never be planted; and, therefore, as the assignee was not named, he cannot be bound. In *Spencer's case* it was said, that where a man leases stock with land, a covenant relating to the delivering up of the stock will not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. In the same case it was held that a covenant to build a brick wall upon part of the land demised did not bind the assignee who was not named. So in *Purefoy's case*, B. R., M. 29 Eliz., Moor, 243; *Godb. 120*, S. C. See *Canham v. Rust*, C. B., H. 58 Geo. 3, 8 Taunt. 231; *Vin. Ab. Cov. (K. 3, 11)*, *Hartley v. Pehalls*, Peake, 131, a covenant by a lessee of a tavern to account monthly to the lessor, for all the wines which should be there sold, and to pay to the lessor, or his assigns, twenty shillings for each tun sold, was a collateral covenant.

Wood, contra.—This is a covenant which runs with the land, and therefore binds the assignee. Where the parties agree, that binds the assignee, though he be not named, if it be a covenant which runs with the land. Suppose the lessee had not delivered up the premises, the assignee of the lessor might maintain an action, and that right must be reciprocal. Moor, 159, pl.

300. It would be inconvenient if the assignee were not to pay, for the arbitrator is to be appointed by the assignee. The covenant is to do a thing upon the land, and is like a covenant to build, or repair a house, which runs with the land. *Alfo v. Henning*, B. R., M. 8 Jac. 1, Owen, 152; *Kitchen v. Buckley*, B. R., M. 14 Car. 2, 1 Lev. 109; *Lougher v. Williams*, B. R., M. 25 Car. 2, 2 Lev. 92; *Matures v. Westwood*, B. R., M. 39 & 40 Eliz. Cro. Eliz. 599; *Goulds*, 175. [Lord MANSFIELD.—The breach of covenant on which the action is founded is the not naming an arbitrator.]

[*354] **Clayton*, in reply.—In *Bally v. Wells* the case in *Moor* was denied. Cur. adv. vult.

LORD MANSFIELD.—We are all of opinion, on the authority of *Spencer's* case, that the covenant to name an arbitrator does not run with the land, and consequently does not bind the assignee. Judgment for the defendant.¹

¹ See *The Mayor of Congleton v. Pattison*, B. R., T. 48 Geo. 3, 10 East, 180; *Colleton v. Letson*, C. B., T. 55 Geo. 3, 6 Taunt. 224; *Canham v. Rust*, C. B., H. 58 Geo. 3, 8 Taunt. 281; *Jourdain v. Wilson*, B. R., H. 1 & 2 Geo. 4, 4 B. & A., 266; *Vernon v. Smith*, B. R., M. 2 Geo. 4, 5 B. & A. 1; *Vyryan v. Arthur*, B. R., H. 8 & 4 Geo. 4, 1 B. & C. 410.

WATKEYS v. DE LANCEY. June 10.

Covenant by defendant that he was lawfully seised of a good estate of inheritance in law in fee simple in certain premises conveyed to the plaintiff. Breach, that he was not so seised, &c., and issue thereon. Previously to the conveyance, the premises had been confiscated by an act of the state of New York. Held that there was no breach of the covenant.

THIS was an action of covenant. The declaration stated, that by an indenture made on the 30th of April, 1782, between the defendant and the plaintiff—reciting that the defendant being seised in fee of a certain messuage and lot of ground in the city of New York, did, by a letter of attorney, dated the 27th of June, 1780, appoint A. and B. his attorneys, jointly and severally to sell all his real estate in the province of New York, or elsewhere, in North America. It was witnessed that the defendant, by B., one of his said attorneys, in consideration of £350 current money of New York, paid by the plaintiff to B. for the use of the defendant, did grant, bargain, sell, release, &c., the premises (in his actual possession, &c.) to the plaintiff in fee, and the defendant covenanted with the plaintiff that he was lawfully seised, in his own right, of a good estate of inheritance in law in fee simple in the premises, and had in himself a good right to grant the same to the plaintiff in fee: that although the plaintiff always, from the time of making the said indenture, hitherto, had faithfully performed and kept all and singular the covenants, &c., yet (protesting, &c.) the plaintiff in fact said, 1. [355] That the defendant at the time of the *sealing and delivery of the said indenture, was not lawfully seised in his own right of the premises of a good estate of inheritance in law in fee-simple; and 2, that the defendant at the time, &c., had not in himself a good right to grant the same to the plaintiff in fee.

The defendant in his plea asserted, as to the first breach, that at the time of the sealing, &c., he was lawfully seised, &c. (in the words of the declaration), and thereupon issue was joined; and also, as to the second breach, that at the time, &c., he had in himself, &c., whereupon issue was also joined.

The cause was tried at Westminster Hall, before Lord MANSFIELD, at the

sittings after last Easter term, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

The estate in question had been the inheritance of the defendant's father, on whose death it descended to the defendant as his heir-at-law, who was seised thereof at the time of the sale, except as to the attainer hereafter mentioned. The defendant was a loyal subject of the king, and left New York and arrived in England, previous to the declaration of the independence of the States, and has resided in England ever since his said arrival. In 1779, an act of attainder and confiscation passed in the state of New York, whereby the defendant's estate in that province was confiscated, and he himself attainted. His attainder was published in the New York papers, but there was no proof of its coming to the plaintiff's knowledge. The plaintiff, in April, 1782, purchased the premises of the defendant, who, by his attorney, covenanted, as shown in the declaration. The plaintiff took possession, in consequence of this purchase, and remained in possession till the commissioners, under the act of attainder, entered, dispossessed the plaintiff, and sold the estate. New York was in possession of the king's army at the time of, and many years previous to, the attainder, and continued in their possession long after, viz. till December, 1783. The preliminary treaty between England and the States of America was signed on the 3d of September, 1783.

The question for the opinion of the court was, whether the action could be maintained. If they should think it could, the verdict to stand. Otherwise, a nonsuit to be entered.

**Baldwin*, for the plaintiff, contended that, on principles of justice, [*356] the plaintiff was entitled to recover the money paid for a title which the defendant knew to be bad. The act of attainder passed before the sale, and was confirmed by the preliminary articles of peace, whereby all the proceedings in Congress were recognised. If the acts of Congress were to be overturned, it would open a door to great inconvenience. The defendant knew that the act of attainder had passed, but that knowledge has not been brought home to the plaintiff. From the moment of the passing of the act of attainder, the defendant ceased to have any title. If, indeed, that act had passed *after* the sale, the defendant would not have been liable. The preliminaries of peace went on the idea that the States had a right to do what they did, and that the confiscation which had taken place were valid; therefore it was recommended that restitution should be made. That recommendation abandons the right.

Bond, for the defendant, was stopped by the Court.

Lord MANSFIELD.—The defendant covenants that he is seised in fee of the lands in question by all the laws in being, but he does not covenant against a rebellion or a revolution by an armed force. There is no color for it.

Judgment for the defendant.

¹ A similar question arose in the case of *Dudley v. Folliott*, B. R., E. 80 Geo. 3, 3 T. R., 584, and was decided on the same ground, the Court observing that even a general warranty, which is conceived in terms more general, has been restrained to lawful interruptions; but where a covenant is made against the acts of a particular person named in it, it is not restrained to lawful interruptions. *Fowle v. Walsh*, B. R., M. 3 Geo. 4, 1 B. & C. 29, 2 D. & R. 33, S. C.

OHLSEN v. DRUMMOND. June 10.

Covenant on charter-party, that the ship having unloaded her outward cargo at St. T. should directly sail for Dominica, where the defendant should load a homeward cargo. Breach: that the defendant did not load, &c. Plea: that the ship did not

unload her outward cargo at St. T. Demurrer: Held that the plea was bad, as the unloading at St. T. was not a condition-*precedent*.

ACTION of covenant upon a charter-party of affreightment.

[*357] The declaration stated, that by a charter-party of **affreightment*, the plaintiff covenanted that the ship let to freight, having unloaded her outward-bound cargo at the island of St. Thomas, should directly sail for and proceed to the island of Dominica, in the West Indies, and there, at either or both the ports of Rousseau and Prince Rupert's Bay, or at either of the islands of Grenada or St. Christopher's, as the freighters should direct, load, take, and receive on board a full homeward-bound cargo; in consideration whereof (i. e. of the labor and other particulars in the said covenant contained, set forth in the declaration, but not necessary to be here mentioned) the defendant covenanted that the freighters, their agents, correspondents, or assigns, should within a specified time, at one of the said islands of Dominica, Grenada, or St. Christopher's, load and send alongside of the ship, at their own expense, such full homeward-bound cargo; and also within a specified time unload and receive, at their own expense, the said homeward-bound cargo at Ostend or Bruges, and to pay for the freight at a certain rate, and at a place and time mentioned in the declaration; and that it was by the said parties mutually agreed that the freighters, or their agents, correspondents, or assigns, were to declare at Dominica within 48 hours after notice given to them of the arrival of the ship there, whether she was to load there or to proceed to Grenada or St. Christopher's to take in her loading; and, lastly, that it should be lawful for the freighters, their agents, correspondents, or assigns, to keep the ship on demurrage 10 days in the whole, or so many of them as need should require, paying for such demurrage at a daily rate specified. That the ship did, after having unloaded her outward-bound cargo, proceed to Dominica, and arrived at the port of Rousseau in that island, and gave the requisite notice of such arrival to an agent of the freighter, and that he, according to the covenant in that behalf, declared that the ship was to load at Dominica; that the ship during the specified time, and for 10 days more and upwards, lay at the said port of Rousseau to receive a cargo; and that the plaintiff, to the knowledge of the agent, was during that time ready and willing to receive a full homeward-bound cargo; but that neither the freighters, nor the said agent, or any agent, correspondent, or assign of theirs loaded, or sent alongside of the ship a full homeward-bound cargo, or any cargo whatsoever, but neglected so to do, and had not paid the stipulated [*358] **sum* for the 10 days' demurrage, contrary to the covenant of the defendant.

The defendant (besides other matters) pleaded, that the ship did not unload her outward-bound cargo at the island of St. Thomas before she proceeded to Dominica, according to the form and effect of the charter-party.

Replication, confessing the matter thereof; that at the time of making the charter-party, and always afterwards, it was understood by the plaintiff that the ship should unload her outward-bound cargo at St. Lucia, if she should be able to go there, and not at St. Thomas, unless she should by some accident be prevented from going to St. Lucia, of which the defendant had notice, with an averment that not being prevented by any accident, she arrived and unloaded her outward-bound cargo at St. Lucia before she proceeded to Dominica.

General demurrer.

Wood, for the defendant.—It will not be contended that the replication is good, but that the plea is bad. The voyage was to commence at Dominica upon an unloading at St. Thomas's. The parties had in contemplation the precise voyage described in the charter-party and no other, and therefore the

unloading at St. Thomas's was a condition precedent. It was by no means immaterial where she loaded, for her getting to Dominica in time depended upon her unloading at St. Thomas's. If instead of going to St. Thomas's the vessel had gone to the East Indies, it would have made a material difference in the contract. Supposing it to be immaterial, why was the stipulation inserted at all in the charter-party? That instrument states that the ship, having unloaded her outward cargo at the island of St. Thomas, should directly sail and proceed for the island of Dominica. After making this stipulation, it was not in the power of the captain to sail elsewhere and afterwards to come to Dominica. This is the nature of a warranty. The captain warrants to the merchant that the ship shall unload at St. Thomas's, and proceed from thence to Dominica, and a warranty must be strictly complied with. Suppose there had been an insurance with a warranty to unload at St. Thomas's, going elsewhere and not unloading there would have been a breach of it. The words of the charter-party are, "having unloaded," &c.; now the words "if," "so that," "provided," all make a condition precedent. *Clarke v. Gurnell*, B. R., E. 9 Jac. 1, 1 Bulstr. 167. So here [*359] the word "having" creates a condition precedent. There are, in fact, two conditions precedent; 1st, that the ship shall unload at St. Thomas's, and shall then directly sail to Dominica; 2ndly, that the ship was in a fit condition for such voyage. Neither of these conditions is alleged in the declaration to have been performed. Unless they operate as conditions the words are nugatory, for there is no covenant.

Per Cur.—This is not a condition precedent. It is a contract on a homeward-bound voyage. The defendant has goods at Dominica, and has nothing to do with the ship until she arrives there. If she does not arrive there in time, he might have objected at Dominica, in which case he would not have been liable upon the covenant. But the fact is, that the agent of the defendant accepted the ship there. The charter-party was effected for the benefit of the plaintiff, and as to the objection to the condition, that is merely form. Judgment for the plaintiff.¹

¹ The principle of this case has been recognised in a number of later decisions on the construction of charter-parties. The principle of the decision in these and other like cases, says Lord ELLENBOROUGH (12 East, 389), "is, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition-precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages." See *Havelock v. Geddes*, B. R., H. 49 Geo. 3, 10 East, 555; *Bornmann v. Tooke*, coram Lord Ellenborough, 1 Campb. 377; *Davidson v. Gwynne*, B. R., E. 50 Geo. 3, 12 East, 381; *Deffell v. Brocklebank*, Exch. E. 67 Geo. 3, 4 Price, 36; *Fothergill v. Walton*, C. B., M. 59 G. 3, 8 Taunt. 576; 2 B. Moore, 630, S. C.; *Storer v. Gordon*, B. R., M. 55 Geo. 3, 3 M. & S. 308. The merchant, however, may make the arrival of the ship by a particular time, or even the arrival of another ship with an outward cargo, a condition precedent to furnishing a homeward cargo for the ship by special and particular proviso. *Abbott on Shipping*, 194, 5th ed., citing *Shadforth v. Higgin*, 1813, cor. Ld. Ellenborough, 3 Campb. 385; *Soames v. Loneragan*, B. R., H. 4 & 5 Geo. 3, 2 B. & C. 564.

See also the notes to *Pordage v. Cole*, 1 Wms. Saund. 320, b.; *Carpenter v. Cresswell*, C. B., M. 8 Geo. 4, 4 Bingh. 409.

*The KING v. The MAYOR and ALDERMEN of LONDON, on the Prosecution of THOMAS WOOLDRIDGE. June 11. [*360]

An alderman of London in custody in execution, and under an escape-warrant, without probability of discharge, may be removed.

THIS was a *mandamus* to restore the prosecutor to the place and office of alderman of the ward of Bridge Within.

The material part of the *return* made by the defendants was as follows :

That the city of London was a city, and the citizens and freemen a corporation by prescription, by the name of the mayor and commonalty and citizens of the city of London. That there have been immemorially within the said city divers wards and divers aldermen of such wards respectively ; and that for 50 years and upwards there had been, and then was, and of right ought to be 26 wards within the said city, viz. (naming them), and 26 citizens and freemen who have been called aldermen. (Then the method of electing the aldermen was stated.) That there hath been immemorially within the said city a certain *court of record*, called "The Court of Mayor and Aldermen of the City of London," held at Guildhall, according to the custom of the city, before the mayor or his *locum tenens* and the aldermen thereof, or at least 12 other of the said aldermen, at such times as it hath seemed meet and necessary to the mayor for the time being, on due notice previously given, according to the custom of the city, for the right administration of justice within the city, and the better order and regulation thereof, and for the consulting about and transacting of other lawful and necessary affairs, &c. That every alderman, before his admission into his office, hath immemorially taken, and of right ought to take, at a court of mayor and aldermen, the following oath, viz.

"Ye shall swear that ye shall, and will, lawfully serve our sovereign lord the king in the city of London in the office of alderman, in the ward of [], whereof ye be chosen alderman, and every other ward whereof ye shall be chosen alderman hereafter, and lawfully ye shall entreat the people of the same ward of such things as to them pertaineth to doe, for keeping of the city and for maynteyning of the peace in the same. And the lawes and [*861] franchises of this *citty ye shall kepe and mayntayne within the citty and without, after your wit and power : and attendant ye shall be to mayntayne the right of orphans after the laws and usages of the same citty, and ready ye shall be to com at the sommons and warnings of the maior and mynisters of this citty for the time being, to speede th' assizes, pleges, and judgments of the hustings, and other needs of this citty, yf ye be not lett by the needs of the king, or by some other reasonable cause. And good and lawful counsel ye shall give for such things as touch the common profit of the citty ; and ye shall sell no manner of victual by retayle, as breade, ale, wyne, flesh, ne fish by your apprentizes allowes, servaunts, ne by any other way, ne profit shall ye none take of any such manner victual so soald during your office. The secrets of this court ye shall kepe, and not disclose anything here spoken for the common wealth of this city, or that might hurt any person or brother of this said courte, unless it be spoken to your brother, or to any other which in your conscience and discretion ye shall think to be for the common wealth of this citty, and well and lawfully ye shall behave you in the said office, and in all other things touching the said citty, as God you helpe."

That the prosecutor was elected alderman of the ward of Bridge Within, at a wardmote holden for that ward on the 13th of May, 1776 ; that on the 18th of June, 1776, at a court of mayor and aldermen, according to the custom of the city, he took the said oath ; that the court of mayor and aldermen have immemorially had and exercised the right to amove any of the aldermen for any just and reasonable cause. That there has been immemorially within the city a certain court called a Court of Common Council, holden before the mayor, or his *locum tenens*, and the aldermen, and the commons of the said city, or the major part of them, duly elected according to the custom of the city in that behalf, being assembled together upon reasonable summons, according to the custom of the said city, which commons so elected,

with the mayor, or his *locum tenens*, and the aldermen, have been immemorially the common council of the city, to consult of and upon all matters and things proposed in common council concerning the said city, and to give and declare their assent and dissent as well for themselves as for the rest of the commonalty and citizens; and that the mayor, or his *locum tenens*, aldermen, and commons, or the major *part so assembled in common council, [*362] have immemorially used and had a right to make such reasonable ordinances, acts, and by-laws as to them have seemed meet for the better government, order, and regulation of the city. That there have immemorially been within the city two sheriffs annually elected from and out of such of the citizens as have been liable to serve the said office. That the mayor hath been immemorially chosen from and out of such of the aldermen as have before served the office of sheriff; and that the office of mayor is an office of very great dignity, pre-eminence, trust, and authority, touching and concerning the *right administration of justice* within the said city, and the good order and regulation thereof. That by a by-law or act of common council, made on the 9th of August, 9th Anne, after reciting that there was then no law in the city empowering any person that was or should be chosen an alderman to excuse himself from taking upon him the said office by reason of insufficiency of estate to support the dignity thereof, or for ascertaining the penalty to be inflicted on any person chosen an alderman, who, being duly qualified, should obstinately refuse or neglect to take the same upon him, it was, among other things, enacted, ordained, and established, that if any person free of the city, who then was or thereafter should be chosen an alderman, should voluntarily take his oath before the mayor and the major part of the aldermen, in open court, that at the time of his election *he was not of the value of £15,000* in lands, goods, and sperate debts; and should likewise bring with him six other citizens of good credit and reputation, who should likewise testify on their oaths that they believed that he had sworn truly concerning the value, such person should be thereby discharged and exempted of and from the said election. That by another by-law or act of common council, made on the 7th of April, 21 Geo. 2, it was, among other things, enacted and ordained, that no freeman who should thereafter be elected or nominated in the manner therein mentioned to the office of shrievalty should be discharged therefrom for insufficiency of wealth, unless he should voluntarily take his oath before the court of mayor and aldermen that he then was not of the value of £15,000 in lands, goods, and sperate debts (and produce six citizens in the same manner as in the by-law relative to the aldermen), in which case the court of mayor and aldermen might discharge any person from any *such nomination or election. That the mayor and commonalty and citizens have been immemorially seised in their [*363] *demesne*, as of fee, in their corporate capacity, of divers messuages, lands, rents, and hereditaments; and lawfully entitled for themselves and their successors to many large and valuable tolls, duties, and customary payments; and also now and for ten years past and upwards have been lawfully possessed, in their corporate capacity, of divers other lands and tenements for certain long terms of years yet unexpired, and that the said several estates, hereditaments, duties, rents, revenues, and possessions are, and at the time of the removal of the prosecutor were, and for a great number of years had been, of a great yearly value, viz., of the yearly value together of £50,000 and upwards. That the office of alderman is, and during all the time aforesaid has been, an office of great trust and power with respect to the management, receipt, control, and application of the issues, rents, and profits of the estates, hereditaments, duties, revenues, and tenements belonging to the said mayor and commonalty and citizens, and in appointing proper officers to col-

lect the same, and is also an office of great trust, preeminence, authority, importance, and dignity, touching and concerning the right administration of justice within the city, and the good order, regulation, and government thereof. That by letters patent bearing date the 25th of August, 15 Geo. 2, reciting letters patent dated the 18th of October, 14 Car. 1, which granted to the mayor and commonalty and citizens, among other things, that the mayor and recorder, those aldermen who should have sustained the office of mayoralty, and the three senior aldermen who should not have sustained that office, should all and every of them be justices to preserve and keep the peace within the city and its liberties, the mayor and recorder to be of the quorum; and also other letters patent dated the 28th of July, 4 Will. & Mar., reciting those of Car. 1, and also a petition of the mayor and aldermen, by which they represented to their majesties that the number of justices under the letters patent of Car. 1 were so few, that it frequently happened that justice could not be administered within the city with so much expedition, so commodiously, and in such manner as might be most expedient for their majesties' service and the utility of their subjects, and granting that six other [*364] aldermen who should be next in the office of aldermen to the *three seniors, and who should have borne the office of sheriff, should (in addition to those formerly appointed) be justices of the peace within the city and its liberties, and that all the said justices, constituted either by the letters patent of Car. 1, or those of Will. & Mar., or any four of them, whereof the mayor or recorder to be one, should have the same powers as were granted to the justices of the peace of any county in this kingdom; and also reciting a petition of the mayor or aldermen, stating that since the letters patent of Will. & Mar. the duties of the justices of peace within the city and liberties were by many statutes much increased, so that the justices had, for the more speedy and effectual execution of justice, agreed to sit daily by turns at Guildhall for the public administration of justice; that they conceived it would be for the public utility of the king's subjects within the city and liberties, and that justice might be still more commodiously and expeditiously administered if the number of justices were further increased, and that the mayor and recorder alone being of the quorum, great inconvenience might arise if by sickness or other unavoidable accident neither should be able to attend the sessions, and praying his majesty to grant to the mayor and commonalty and citizens that the mayor, recorder, and all the aldermen might be justices of the peace for the city and liberties thereof, and that as well all the aldermen who should have sustained the office of mayoralty, as the mayor and recorder, should be of the quorum, George II., granted the said mayor and commonalty and citizens, according to the prayer of the last-mentioned petition. That the said letters patent were accepted. That from and after the granting thereof till the 3d of December, for the more speedy and effectual execution of justice, a certain *rota*, called a *rota* of justices, had been settled in each year respectively, by and with the consent of the aldermen for the time being, fixing the respective days of attendance of the respective aldermen, except the lord mayor and such alderman or aldermen as was or were sheriff or sheriffs, at Guildhall, in their turns, so that one of the said aldermen might attend on every day in the year, Saturdays and Sundays excepted, at Guildhall, as a justice of the peace; and that accordingly, during all the time last mentioned, the aldermen ought and had been used to attend according to such *rota*. That by the *rota* settled from the 1st of October, 1781, to the 24th of *October, 1782, the following days were appointed [*865] for the attendance of the prosecutor at Guildhall as a justice of the peace, viz., 19th October, 22d November, 26th December, 29th January, 4th March, 5th April, 9th May, 12th June, 10th July, 19th August, and 20th

September; and that by the *rota* settled from the 11th of October, 1782, to the 16th of October, 1783, the following, amongst other days, were fixed and appointed for his attendance, viz., the 22d of October and the 20th of November. That by virtue of the will of Sir John Langham, Bart., bearing date the 31st of August, 1764, and of a decree of the Court of Chancery of the 13th of June, 1769, the mayor and aldermen have had and have the disposal of the interest of £6000, as a fund for the relief of poor distressed soldiers and sailors and their families, the said sum being vested in certain trustees, and the interest paid over by them to the chamberlain of the city, and by him accounted for and paid over to the order of the mayor and aldermen for the purpose before mentioned. That at a court of mayor and aldermen holden on the 7th of December, in the year 1773, an order was made that the chamberlain should pay out of the fund arising from Sir John Langham's legacy £4 to one poor distressed soldier, and £4 to one poor distressed sailor, who should be recommended to him by the mayor and each of the aldermen. That the interest of the said £6000 is the said fund arising from Sir John Langham's legacy.

That the prosecutor being and acting as an alderman, on the 4th of December, 1781, signed an order, directed to John Wilkes, Esquire, the chamberlain of the city, requiring and ordering him to pay to James Aspin, a poor distressed seaman, £4 out of the said fund, and procured the said Aspin to subscribe his mark to a receipt on the same paper, purporting that he had received the said sum of £4, the prosecutor himself writing the attestation of such subscription by Aspin, and that the prosecutor, as such alderman, actually received the said sum of £4 from the chamberlain for the use of Aspin. That the prosecutor being and acting as an alderman, did by the means above mentioned, fraudulently, deceitfully, and corruptly, obtain the said sum of £4 under pretence of its being paid to and for the use of Aspin, and afterwards paid or caused to be paid to the said Aspin the sum of £1. 1s. only, parcel of the said sum of £4, but deceitfully, fraudulently, and corruptly *retained and converted the residue to his own use. That in Decem- [*366] ber, 1700, one Lambert, a servant of one Hearsley, was carried before the prosecutor as such alderman and justice of the peace, and charged with having robbed Hearsley of a certain sum, and the prosecutor having heard the charge, did with the consent, and at the request of Hearsley, agree and undertake that Lambert should be discharged and freed from the said charge, and from all legal punishment on that account, on condition that he would enter into the king's service as a soldier or sailor, and that Lambert having agreed to the condition, was duly enlisted, attested and sworn before the prosecutor to serve as a soldier in the 100th regiment, and was committed by the prosecutor to safe custody until the person who had enlisted him should be able to remove him to the regiment. That the prosecutor afterwards, in the said month of December, deceitfully, wrongfully, corruptly, and wickedly, obtained from one Parry, who had applied to him to procure the discharge of Lambert, a promissory note for the payment of £18 by Parry, to the prosecutor, under a false pretence that he would procure such discharge, by providing two substitutes to serve in lieu of Lambert, alleging to the said Parry that he could not otherwise be discharged, and that the expense of providing the two substitutes would amount to £18, or thereabouts. That the prosecutor did not in fact provide any substitute or substitutes whatsoever, nor was or were any ever provided for the said Lambert, nor any money ever paid by the prosecutor, or caused to be paid for his discharge, but on the contrary, the prosecutor afterwards, as such alderman and justice of the peace, discharged him out of custody before he could be removed to the said regiment. That the prosecutor afterwards, being such alderman, obtained and

took from Parry a promissory note for £15 in lieu of the other, falsely pretending that he had procured Lambert's discharge for £15. That the prosecutor, being such alderman, afterwards corruptly, fraudulently, deceitfully, and extorsively, took from the wife of Parry £9 9s. in satisfaction of the last-mentioned note, on a promise, in consideration thereof, to deliver up the note, and that he corruptly converted the said £9 9s. to his own use, contrary to his duty as an alderman and justice of the peace, and that he did not deliver up [*367] the note according to his promise, but payment thereof was *afterwards demanded of Parry. That the prosecutor, whilst he was such alderman, viz., on the 11th of December, 1781, was, and continually from thence until, and at and after the time of his amotion, remained and continued a prisoner confined in jail in execution for debt, and thereby during all that time was wholly prevented from performing and executing the duties of his said office as an alderman and justice of the peace of the said city, and did not, during all that time, or any part thereof, perform and execute the duties of the said office of an alderman and justice of the peace of the said city, and that at the time of his amotion he was so detained in prison for debt under several executions, at the suit of divers persons, and also under two escape warrants, and was so unable to pay his debts, and so destitute of friends and assistance for that purpose, that there appeared no probability of his being discharged out of prison. That after the said 11th of December, 1781, and before the amotion of the prosecutor, divers Courts of Aldermen were duly holden, to wit, one on each of the following days, viz., the 29th of January, the 12th and 26th of February, the 5th and 19th of March, the 23d of April, the 7th, 9th, and 28th of May, the 11th and 25th of June, the 2d and 23d of July, the 24th and 28th of September, the 8th, 22d, and 31st of October, the 5th of November, and the 3d and 17th of December, 1782, and the 21st of January, and the 5th and 18th of February, 1783. That after the said 11th of December, 1781, and before the amotion of the prosecutor, divers Courts of Common Council were duly holden, to wit, one on each of the following days, viz., the 5th, 19th, and 27th of February, the 20th of March, the 9th of April, the 17th and 30th of May, the 20th of June, the 9th of July, the 29th and 31st of October, the 21st of November, and the 11th and 19th of December, 1782, and the 6th and 20th of February, 1783. That there has been immemorially, and is, in the ward of Bridge Within, a court of Wardmote holden every year on the feast of St. Thomas, unless that day fall on a Sunday, and in such case on the day next following, before the alderman of the ward, for the election of Common Councilmen and other ward officers for the ensuing year, and for the despatch of other business relative to the ward. That on the feast of St. Thomas, in 1781, being on the 21st of December, and on the same feast in [*368] 1782, being also the *21st of December, the prosecutor, as such alderman of the said ward, did not hold or attend any Court of Wardmote for the purposes above-mentioned, contrary to his duty as such alderman, but by reason of his said imprisonment neither did nor could hold or attend the same, nor did nor could the said prosecutor, during his said imprisonment, or any part thereof, attend to the occasional or incidental business of the said ward, or entreat the people of the same, of such things as to them pertained to do, according to the oath above specified, and his duty as such alderman in that respect. That the prosecutor, by reason of his said imprisonment, did not, nor could attend at any or either of the said courts of aldermen, courts of common council, or courts of wardmote, whereby the said ward was wholly deprived of his assistance and counsel at each of those several courts. That the prosecutor did not, after the said 11th of December, 1781, attend, nor by reason of his said imprisonment could attend as alderman and

a justice of the peace at Guildhall on any or either of the days so fixed and appointed for his attendance there, whereby the city was deprived of the benefit, advantage, and convenience which it ought to have received from his attendance on those days, and the public administration of justice within the city was thereby interrupted and delayed. That the prosecutor was not discharged from his said imprisonment until the 21st of June, 1783, and that the office of an alderman of the city was, by reason of the said conduct, circumstances, and situation of the prosecutor, become, and was greatly disgraced, and brought into great scandal and contempt.

That at a Court of Mayor and Aldermen, held on the 22d of October, 1782, a petition signed by the deputy of the ward of Bridge Within, divers of the Common Council, and the major part of the inhabitants and householders thereof, who were then freemen of the city, and qualified to vote at the wardmote elections for the said ward, was presented to the said Court:

Showing that the petitioners had for a considerable time suffered great inconvenience occasioned by the prosecutor's being confined in prison; that they were not represented in that Court, nor in the Court of Common Council; that his confinement rendered him incapable of discharging the active duties of his appointment, and deprived them of that assistance to which they had a just claim, and they thereby *observed that there appeared no probability of his enlargement; and therefore praying the Court to afford [*369] them such relief as they in their wisdom should think meet.

And thereupon it was ordered by the said Court, that a copy of the petition should be delivered to the prosecutor, and that he should have notice given him to attend in his place at a Court of mayor and aldermen to be holden on the Tuesday next following. That on the 24th of October, 1782, the prosecutor had a copy of the petition, and also of the said order served on him, and thereby had notice to attend as aforesaid. That on Tuesday the 29th of October, 1782, being the day on which he had notice to attend, no court of mayor and aldermen was holden, nor any further proceedings had upon the premises against him until the 17th of December, 1782. That, at a Court holden on the last-mentioned day, another petition, signed and subscribed by the deputy of the said ward of Bridge Within, and the major part of the then common council, being freemen of the city, and qualified to vote at the wardmote elections for the said ward, was presented to the said Court.

Showing (amongst other things), that the petitioners, together with other inhabitants of the said ward, whose names were thereunto subscribed, on the 22d of October then last, presented a former petition to that Court, setting forth, that, &c. [Here the allegations and prayer of the former petition were recited *verbatim*.] That, in addition to the several allegations in the said petition, the petitioners further represented to the Court that they were informed that the prosecutor, having in December, 1781, signed an order to the chamberlain to pay to Aspin £4 out of the fund for the relief of distressed soldiers and seamen, he himself, although the poor object also attended with him in person for the purpose, received the £4, and afterwards gave, or caused to be given to him one guinea only and no more, as part thereof; and upon a then late application made to him for the remainder, alleged that he had disposed of the same to other persons; that the petitioners were likewise further informed, that the prosecutor, some time in or about November, 1780, obtained from Parry his note of hand for £15, under pretence of its being for the purpose of providing two substitutes to serve in the room of Lambert, who had been then lately brought before him as one of the magistrates of the city for robbing *Hearsley, his then master, and who, by consent of all parties, had been discharged therefrom; [*370]

that he afterwards extorted, or unlawfully obtained from the wife of Parry nine guineas on account of such note, and threatened to sue the said Parry for the remainder thereof. That the petitioners were further informed that the prosecutor was then a prisoner in execution for several different debts, in New Prison, Clerkenwell, and that two of such executions were upon escape warrants, in consequence of which he was, as they were also informed, thereby rendered incapable of taking the benefit of any act thereafter to be made and passed for the relief of insolvent debtors. That the petitioners trusted they should be able to prove those several facts by sufficient evidence, and as they appeared to the petitioners to render the prosecutor altogether incompetent and unfit to hold the high office, and discharge the important duties of an alderman of that city and ward, therefore praying, that a day might be appointed for hearing their evidence in support of the allegations in their said petition, and that the Court would afford them such relief as they in their wisdom might judge meet.

And thereupon it was ordered by the said Court, that the prosecutor should attend at a Court of mayor and aldermen, to be holden on the 21st of January then next, by himself, his counsel or attorney, to answer the allegations of the said last-mentioned petition, and to show cause, if any he had, why he should not be moved from the office of alderman of the city, for the ward of Bridge Within, and that a copy of the last-mentioned petition, and of that last-mentioned order, should be forthwith served upon him. That on the 18th of December, 1782, a copy of the last-mentioned petition and order was served on the prosecutor. That all the aldermen of the city, except the prosecutor, were afterwards, and before the said 21st of January, 1783, according to the custom of the city, summoned to appear at the said Court to be holden on the said 21st of January, for the said purpose. That a Court of mayor and aldermen was holden on that day, and that the prosecutor did not personally attend, but, by his counsel, prayed that further time might be granted, to answer the allegations of the last-mentioned petition, and to show cause why he should not be moved from his said office, and thereupon it was ordered by the Court, in compliance with the said prayer

[*371] *of the prosecutor, that the further hearing of the matter should be adjourned to the 18th of February then next, whereof the prosecutor then and there, and afterwards, viz., on the 24th of January, 1783, had notice, and it was also ordered by the same Court, that notice thereof should be inserted in the summons for the said Court to be holden on the 18th of February, but divers witnesses, by the consent of the prosecutor's counsel, were examined upon oath by, and at the said Court holden on the 21st of January (the said Court having competent authority to administer the same), in support of the allegations contained in the last-mentioned petition, and were cross-examined by the said counsel. That all the aldermen, except the prosecutor, were afterwards, and before the said 18th of February, according to the custom of the city, summoned to appear at the said Court to be holden on the 18th of February, and that notice of the last-mentioned order was inserted in the summonses to each of the aldermen, that the said matter would be further proceeded on at such Court. That a Court of mayor and aldermen was holden on the said 18th of February, pursuant to the last-mentioned order, and that the prosecutor did not personally attend, but by his counsel prayed further time to answer, &c. (as before), but no sufficient cause being offered, or appearing to the Court why they should not then proceed, it was then resolved by the Court to proceed immediately to the hearing of the said matter, which they accordingly did, and heard further evidence upon oath, in support and proof of the allegations of the said last-mentioned petition against the prosecutor, and were ready to have heard any

evidence which might have been offered on his behalf, either by himself, his counsel, or any other person, to show why he should not be amoved from his said office, but that no evidence, or any other matter on his behalf, or in his defence, was given, nor any cause shown why he should not be amoved from his said office; it was thereupon ordered by the said Court, that the said last-mentioned petitioners, and also the prosecutor, should attend at a Court of mayor and aldermen, to be holden on the 25th of February then next, by themselves, their counsel or solicitor, and that the prosecutor should then answer the allegations of the last-mentioned petition, and show cause why he should not be amoved from his said office: that on the 21st of February, a copy *of the last-mentioned order was served on the prosecutor, [*372] and that all the aldermen of the city, except the prosecutor, were afterwards and before the said 25th of February summoned, according to the custom of the city, to appear at the said court, to be holden on the 25th of February, for the purpose aforesaid: that a court of mayor and aldermen was holden on the said 25th of February: that the said last-mentioned petitioners appeared at the said court: that the prosecutor was solemnly called at that court to appear, by himself, his counsel, or attorney, to answer and show cause as aforesaid; and that he did appear by B. W., his attorney, who produced or offered to produce no evidence, or other matter whatever, on his behalf or in his defence, nor showed any cause as aforesaid, except an affidavit made by the prosecutor, and also a letter of the prosecutor addressed to the mayor and aldermen, and then read to the Court; and that the said Court then duly heard all that was alleged or offered on behalf of the prosecutor, in answer to the allegations of the said last-mentioned petition, and why he should not be amoved from his said office: that all and singular the premises having been duly and deliberately weighed and considered by the said Court,

It was resolved unanimously by the said Court, 1. That the petitioners had sufficiently made good their allegations against the prosecutor respecting Sir John Langham's legacy, and the extortion of nine guineas for the discharge of Lambert; 2. That they had also sufficiently made good the allegations of their petition respecting the confinement of the prosecutor, and his consequent inability to discharge the active duties of that important office; 3. That that Court did, for the causes aforesaid, thereby order, adjudge, and direct that the prosecutor should be amoved, dismissed, and discharged from the place of office or alderman of that city and of the said ward of Bridge Within; and the said prosecutor was by the said Court amoved, dismissed, and discharged accordingly.

And the said Court did then desire the mayor to hold a wardmote for the said ward of Bridge Within, according to the usage and custom of the city for the election of a fit and able person to be alderman thereof in the room of the prosecutor, so by that Court amoved, dismissed, and discharged: that the prosecutor, since he was amoved from the said office, had not been elected, admitted, or sworn into or restored to *the place or office of an alderman of the said city and ward: that afterwards, on the 28th of Feb. [*373] ruary, 1783, a court of wardmote was holden in and for the said ward of Bridge Within, in pursuance of the said requisition, and according to the usage and custom of the city, for the election of a fit and able person in the room of the prosecutor so by the said last-mentioned court of mayor and aldermen amoved, dismissed, and discharged; at which wardmote I. S., Esquire, citizen and draper, was duly elected alderman of the said ward in the room of the prosecutor so amoved, dismissed, and discharged; and that afterwards, at a court of mayor and aldermen holden on the 12th of March, 1783, the said I. S., so elected as aforesaid, took the oath above set forth;

and also took and subscribed the oaths, and made and subscribed the declarations according to the several laws made for those purposes; whereupon he became and was and still was an alderman of the said city and ward, in the room of the prosecutor so amoved, dismissed, and discharged; and that, for those reasons and causes, they, the said mayor and aldermen, ought not, nor could they, restore the said prosecutor to the said place or office of alderman of the said ward of Bridge Within.

The return to the mandamus having come on to be argued,

Garrow, against its sufficiency.—There are two objections to the return in point of form: 1. Admitting that a power of amotion exists in the corporate body at large, and that by charter or prescription such a power may be delegated to a part of that body, yet the cause of amotion must be, 1st, reasonable; 2d, just; 3d, agreeable to the laws of the land; 4th, the custom or prescription must be strictly pursued. In order that it may be seen whether these requisites have been complied with, the manner of amotion must be stated, and this cannot be done without stating the prescription itself. *R. v. Richardson*, E. 31 Geo. 2, 1 Burr. 517; *R. v. Lyme Regis*, E. 19 Geo. 3, 1 Dougl. 153; *R. v. Mayor of Doncaster*, T. 25 Geo. 2, B. N. P. 205; *R. v. Wilton*, M. 8 W. 3, 5 Mod. 257. In the latter of these cases there was a prescription to amove, but it was not stated that the amotion was on hearing the complaint. *The mode of amotion must also be stated. 1 [*374] Vern. 19.

The second objection in point of form is, that in the sentence it is not expressed that the amotion was in pursuance of the power which the corporation have prescribed for, in the preceding part of the return. All the precedents state the amotion to be an exercise of the power vested in the corporation by charter. *R. v. Mayor of Coventry*, M. 10 W. 3, Salk. 480; 1 Lord Raym. 391, S. C.; *R. v. Taunton St. James*, H. 16 Geo. 3, Cowper, 413; where the amotion is alleged to be in pursuance of such a custom, and agreeable thereto. Here, in every other instance which requires the sanction of the custom, it is stated to have been done in pursuance of the custom, and it is omitted only in this case, which is the essential part of the return. They say generally that "they amoved him." It may be asked, whether upon the whole of this case the Court are not to take it as being done under the prescription and conformable thereto; but that the answer to that is, it may be done by a by-law. In the case of *R. v. Wilton* the return was held bad because it did not say that the prosecutor was heard and disfranchised *apud commune concilium*.

The third objection in point of form is, that it ought to have been alleged positively, and not by way of argument, that the prosecutor was amoved for the cause stated in the return; the words are, "for the causes aforesaid, that he should be amoved, and that he was amoved accordingly."

But this objection was given up.

As to the several objections in point of substance, it is necessary to consider the several charges which are the ground of the amotion. Each of these charges must refer to a principle of law as a cause of amotion, and must rest on acting contrary either to the laws of the particular society or to the laws of the land. It is a general proposition that an amotion can be for nothing but an offence. A corporator is amovable for offences against the duties of his office, but for offences against the law of the land there must be a conviction. *R. v. Richardson*, 31 Geo. 2, 1 Burr. 517. In the present case the charge is of a mixed nature, some part being as against his duty as a corporator, some as against the law of the land.

[*375] *One charge is, that the prosecutor gave only £1 1s. to an old soldier out of £4 which he had received for the purpose of charity.

In fact he distributed the remainder to other objects equally worthy. This payment was to be made by the chamberlain in obedience to the will of Sir John Langham, and of a decree of the Court of Chancery. This, therefore, is not corporation money, but is given to the mayor and aldermen as a designation of the person who is to distribute it according to the direction of the testator, which is, that he to whom the chamberlain pays it shall distribute it according to his discretion; and at the time of an expensive war, many objects presenting themselves, it would be improper to bestow all upon one. There was an order of the court of aldermen to give £4 to one poor soldier and £4 to one poor sailor; but the court of aldermen have no power over this money. The city cash is in the power of the court of common council, and not of the court of aldermen. Supposing this order to be valid, it was made in time of peace, and the distribution took place in time of war. It was made before the prosecutor was an alderman, and therefore, at most, it was only a mistake. Taking it most strongly against the prosecutor, and granting that it was corporation money, and that he applied it to his own use, still there is not a cause of action, because the corporation have an action for it. *Rex v. Chalke*, E. 9 W. 8, 1 Lord Raym. 225, 5 Mod. 257, S. C. The return does not state that the money was received without the assent of the corporation, or that the prosecutor was called upon for an account. In the *Ipswich* case, H. 4 Anne, 2 Lord Raym. 1232, it was held that if the corporation can have an action, the Court will not interfere to deprive a man of his freehold by disfranchising him. Admitting that it may be a doubt whether Aspin himself could maintain an action, it does not follow from thence that the prosecutor was guilty of an offence.

The second charge is the obtaining a note of hand from William Parry as a consideration for procuring two substitutes for him, and afterwards extorting £9 9s. from the wife of Parry. Nothing is here stated to have been done contrary to his corporate character. Discharging William Parry is no charge. Procuring a substitute is no part of *his corporate duty. [*376] Obtaining the note, if any offence, is an offence at common law, and then it must be supported by a conviction, but here is no conviction stated. Certainly procuring money under false pretences is a good ground for an information or an indictment, but no such proceeding has taken place here. Perhaps it will be said that this charge is of a mixed nature; but if it be, there being no conviction, it would be to deprive the prosecutor of a trial by his peers; and supposing him in that situation which is merely the object of an information or an indictment, he would by this action be tried before those who were the promoters of the charge, the accusers of the party, the witnesses, and finally the judges, some of whom, by passing sentence against him, would be one step nearer the civic chair. Is the offence such as could be inquired into in the courts of law? It is. If so, the prosecutor is drawn from a jury upon their oaths, before a jury not upon their oaths. General immorality, or vicious conduct, is not a cause of action but of reprehension merely. *Baggs's case*, 13 Jac. 1, 11 Rep. 98, b.

The third charge is, that the prosecutor was imprisoned for debt on two escape-warrants. This Court has said that imprisonment is a misfortune but no crime; and, therefore, if imprisonment is no offence it is no cause of action. The imprisonment arose partly from the misfortunes of the prosecutor and partly from the villany of others. He was in a great way of business as an American merchant, and suffered heavy losses by the war. [Lord MANSFIELD.—We cannot take his word for that.] He was accused of not being in a situation from which he was likely to be discharged; but the fact is, that he was discharged within two months after this action. The offence meant by the charge is, that he was absent from the duties of his

office, but his imprisonment is an apology for his absence. The oath taken by an alderman is that he shall do his duty "unless lett by reasonable cause," therefore it must be a wilful neglect and disobedience to the summons of the lord mayor. But it is not stated that he was either summoned or warned, except when he was summoned as a criminal. That imprisonment is a reasonable cause appears from the case of *Rex v. Richardson*, E. 81 Geo. 2, 1 Burr. 517, which is conclusive against the return. It is well known that thirteen constitute a court of aldermen, *yet for many months in the summer a court of aldermen cannot be held for want of a sufficient number. Still it never was thought of amoving any for this absence. An absence for four months is not a cause of amotion, *Rex v. Leicester*, E. 7 Geo. 3, 4 Burr. 2087; nor is bankruptcy, *Rex v. Liverpool*, H. 32 Geo. 2, 2 Burr. 723. If this be law, imprisonment for debt cannot be a cause of amotion. It is much easier to throw a man into prison than to sue out a commission of bankrupt, and thus the purposes of a junto (which exist in every corporation) may be served. The decision of this cause will determine a general question, applicable to every corporation in the kingdom. The office of alderman is not of such great importance and trust as is generally imagined, for the city cash is in the power of the court of common-council and not of the court of aldermen. In *Butler and Goodall's case*, B. R., E. 40 Eliz., 6 Rep. 21, b., it was held, on the statute 21 Hen. 8, that lawful imprisonment without cause was a good excuse for non-residency. That statute has notwithstanding always been construed strictly. Surely, then, in this case imprisonment is an excuse, since it is within the words of the oath. Of late years it has been the custom and practice for many aldermen to absent themselves for years together. There cannot therefore be any inconvenience to the corporation by their absence. [Per Cur.—This is a statement of facts out of the return.] Cases may be put by way of supposition, as of Alderman Peckham residing in Italy for four years, of Alderman Clarke being the representative of a rebellious congress for four years, and of Alderman Bridgen. These cases show the opinion of the corporation as to the necessity of the presence of an alderman. Suppose a man, being an alderman, is called to the office of sheriff at the time when he is actually under the punishment of imprisonment for what is adjudged to be a most defamatory and infamous libel. This would be pretty good evidence of what the city of London thought of such a man, and that they conceived the absence of such an officer to be not very material to the well-being of the corporation.

Gibbs, for the return.—The charge justifies the city for the amotion. It has been objected in point of form, that *the objection is not sufficiently stated; but if the corporation be a body in law that may prescribe, if the power of amoval be such as is prescribed for, and if this right has been immemorially prescribed for, then the prescription is sufficiently stated. It is also objected in point of form that the sentence is not expressed to be in pursuance of a power to amove; but unless a by-law is presumed, which it cannot be, the power to amove is sufficiently stated. The third formal objection has been abandoned. Upon the merits, *Bagg's case* is strong to show that whatever is done against the duty of a citizen is a cause of amoval; and some of the charges in the present case are fully within this description. 1st, As to the fraud on *Aspin*. It was ordered by the lord mayor, and aldermen that the chamberlain should pay the sum of £4 to a poor soldier, and £4 to a poor sailor. The prosecutor being an alderman, and acting as such, signed a paper requiring the chamberlain to pay to *James Aspin* the sum of £4. As *Aspin* could not write his own name, the prosecutor procured him to sign with his mark, a receipt for £4. That sum was received by the prosecutor from the Chamberlain, and after paying

Aspin only £1 1s., the remainder was retained by him. This is the charge in the return. By the will, the whole was to be disposed of by the court of the lord mayor and aldermen. The prosecutor, as an alderman, had the disposal of the money, and by deceiving the poor man, got him to sign a receipt for £4, while in fact he paid him only £1 1s. He received this money in his capacity of alderman, and therefore the not paying it over faithfully, was acting against the duties of his office. By this transaction the city would be prejudiced in character, and the consequences would fall on the court of the lord mayor and aldermen, and not on the prosecutor, who acts as their servant. An information might be filed against them, and to that extent they are prejudiced. If this be not a sufficient ground for removal, the only thing the city can do will be to make a special order, stating the misconduct of the prosecutor, and excluding him from the future disposal of this money. The case of *Rex v. Chalke* is the only one which seems against the return, but the reason given in *Lord Raymond* does not apply here. He says, misapplication of corporation money is not a sufficient ground of disfranchisement, because the corporation have their action; but here the corporation cannot maintain an action. It is not *necessary to contend that every case of misapplication is a ground of amotion, but this is a corrupt dishonest misapplication. The impossibility of otherwise freeing the office from future instances of dishonesty and corruption is the real ground of amotion; for if the prosecutor had remained in office he would have had no great difficulty in finding another poor soldier or seaman who can neither read nor write. To say that the proper remedy for this poor man is to sue the prosecutor, is to ridicule his distress. It is said on the other side, that the prosecutor gave the residue to other objects, but that is misstating the case from the petition, for from the return it appears that he kept it in his own pocket. [BULLER, J.—The charge does not allege that he put the residue in his pocket. Lord MANSFIELD.—It is a very material part of the case, and you had better first establish it. I refer now to the second petition; see whether this charge is not contained in that. Garrow.—It is not so charged in either of the petitions, but in the return it is.] The return states the whole of his conduct to Aspin, and his fraud on Parry, and his imprisonment; and these facts being so, a petition from his own ward was presented, praying that he might be removed. In that petition it is stated that he received £4 4s., and gave to Aspin £1 1s. and no more; and on an application to him for the remainder, he alleged that he had disposed of it to other persons. But he had an opportunity of exculpating himself from this charge, and was heard by his counsel. [Lord MANSFIELD.—Is there any charge in the petition of corrupt conduct? It must be in the petition—the return is nothing to the purpose. BULLER, J.—They state one thing as a fact charged, and another imputed to him, which he was called on to answer.] The second charge in the petition is the extortion from Parry. The return states the taking of two notes of hand from Parry as a consideration for providing two substitutes to serve in the militia for Lambert, who had been brought before him for robbing his master, and then extorting £9 9s. from the wife of Parry. This was an offence against his duty as a justice of the peace, and consequently against his duty as an alderman. The charge is, that Lambert was brought before him as a magistrate, and that in that capacity he obtained a note from Parry for Lambert's discharge. This was also to the prejudice of the city. The other side admit this, but say that a previous conviction is necessary, *inasmuch as it is a mixed offence, and ought therefore to have been proceeded against at common law. But there [*380] is no authority for this in *Bagg's* case, nor will *Rex v. Richardson* support it. [Lord MANSFIELD.—It is not settled what may be the consequence of a mixed offence.] On the reason of the thing a conviction is no criterion of

guilt, for the crown may pardon. The crown cannot pardon for offences against the duty of a corporator; but if he goes one step further, and commits an offence of a mixed nature, the crown may then pardon. The error arises from considering disfranchisement as a punishment, when it is in fact a proceeding taken by a corporation for their own defence. The person disfranchised may afterwards be punished by indictment.

As to the imprisonment, the petition states that the prosecutor was in custody in execution, and was also detained on two escape warrants. It appears from the return that there have been a mayor and aldermen time immemorial; and the return then states the manner in which the city conduct their public business. Admitting that every imprisonment is not sufficient cause to remove a corporator from his office, yet the imprisonment, which is not sufficient to remove, must be such as to leave a hope that he may return to his duty. But if he is rendered unable to do this, whether it be by his own default, by the act of God, or otherwise, he is removable. *Rex v. Truebody*, E. 5 Anne, 2 Lord Raym. 1275, *City of Exeter v. Glide*, T. 3 W. & M., 4 Mod. 38. The principle of these two cases is, that if a corporator can show no reasonable ground to presume he will return, it is a cause of amotion. In the present case it appears that the prosecutor had been in prison one year and two months; and at the time of amotion was charged in execution at the suit of several persons, and also under two escape warrants. There was therefore a fair presumption that he would be unable to procure his discharge. No corporate business can be done without the presence of thirteen aldermen. It is possible that out of twenty-six aldermen, fifteen, or a greater number, may be in such a situation that they cannot, according to any reasonable presumption, return to their duty. Then as they cannot be removed, according [*381] to the doctrine on the other side, the *constitution of the corporation must be destroyed. The return states the duty of the alderman; it does not state his imprisonment as an *excuse*, but as a *reason* for his non-attendance. Every alderman represents a portion of the city, and the several wards are intrusted to their respective care. Their attendance is necessary at the wardmote of each ward respectively. Any of the three causes taken separately would be a sufficient cause of amotion; much more than when taken collectively. The court of aldermen have ever been anxious to preserve the purity of the office, by imposing an oath purposely to exclude persons who from the poverty of their circumstances are unfit for the office. Any one elected an alderman may be excused, if he will swear that he is not worth a certain sum. The prosecutor has been guilty of a gross fraud as an alderman; of extortion as an alderman and justice of the peace; and was a prisoner for debt without hopes of enlargement. If all these causes are not sufficient to justify removal, the vilest cheat, and most infamous extortioner may be an alderman of the first commercial city in Europe.

Lord MANSFIELD.—The two questions of form perhaps do not apply. As to the three other charges, I do not think that the first is a sufficient ground of amotion. It is stated that he gave £1 1s only, and that he alleged he gave the rest to other objects; but it is not charged that he withheld the residue from Aspin from corrupt motives. The second charge is misbehavior, and is a breach of his duty as a justice of the peace. This is against the general law of the land, and though he is an alderman as well as justice of the peace, yet as it is a breach of the law of the land, the party must be convicted. The great point is the last, which is a very material one. He is removed because he has left the place. This is no offence; it is no crime. But it prevents him from doing his duty. The case of the *City of Exeter v. Glide*, cited by Mr. Gibbs, is very strong. Leaving the place is a cause of amotion; and whether it be by his own act, or otherwise, if it renders him

incapable of performing his duty, he ought to be removed. The duty of an alderman is stated in the charter of George II., and one part of it is to sit by rotation as justice of the peace. Another part is, that he represents the common council of his ward in the court of aldermen. It is stated that the prosecutor was one year and two months under an arrest, and that there was *no prospect of his being discharged and returning to his [*382] duty.

BULLER, Justice.—The two questions of form are very properly stated by Mr. Garrow; but the principal point is the return. And this should be the subject of another argument, as to what is or is not a cause of amotion. It is necessary to see what the prosecutor was called upon to answer; and this question divides itself into two heads: 1st, As to the public administration of justice as an alderman. 2dly, As to his non-attendance—and this affects the corporation only—viz., in the not holding wardmotes. This does not affect the administration of the public justice of the country. The case of the King v. Ipswich is well worthy of attention. As to the second charge, there is no doubt that it is a common law offence, and that there must be a conviction. I could wish the counsel to confine themselves wholly to the last cause. As to the first, the receiving the money from the chamberlain, it is no offence. It is not charged that he applied any of it to his own use, and his allegation of applying it to other objects is not contradicted.

Sergeant *Adair* desired that he might not be precluded from arguing the case on all the points, which was granted him.

In Easter term the case came on to be argued by *Bearcroft* and *Adair*, Sergeant.

Bearcroft, against the return.—A peremptory mandamus must issue, unless there appears on the return a sufficient cause of amotion. The argument is now in a narrow compass, but it involves a question of great importance. There is no case at all in point to show that a corporator may be removed for involuntary imprisonment. By first looking at the record it may perhaps be found unnecessary to determine the point of law. The facts stated in the return must be stated with certainty and plainness, and the return must not be argumentative. Notice must be given to the party charged, and the Court must see what it is that the body amoving had adjudged. The only notice here is the two petitions. With regard to the first, the prosecutor was summoned to attend in his place as alderman, and was not called upon to defend himself against any charge. On the second petition the proceedings were regular; but the notice related only to that petition and not to the former. The second petition has certainly a reference to the first, *but not such as the Court can take notice of. The charge on the imprison- [*383] ment is in the second petition only. It is not certain what the court of aldermen have adjudged, and on that ground alone the Court will grant a peremptory mandamus. Supposing that imprisonment may, under certain circumstances, be a cause of amotion, and under other circumstances not be a cause of amotion, it must appear with certainty what the circumstances are. The allegation is, that the ward had for a considerable time been deprived, &c. If the time be at all material, this allegation is too loose. It is said to have been of "great inconvenience," but it is not said what. The particular inconveniences mentioned are, that they are not represented in the court of aldermen and common council. The charge does not point at his duty as a magistrate. The cases cited on the other side with regard to imprisonment do not apply. They were cases of voluntary withdrawing from the corporation. In *R. v. Richardson* an absence of four months was held not to be a sufficient cause. Thus, then, it appears that there are cases in which absence will not justify amotion: it follows that the circumstances in this re-

turn ought to have been stated with more certainty. It should have alleged the time of the imprisonment and the particular inconveniences sustained.

Adair, Sergeant, contra.—After what has passed, the point of imprisonment is all that need be argued. [Lord MANSFIELD.—Exercise your own judgment. If you think the other points against you, you may abandon them, but do not suppose that you are prejudged: the Court are ready to hear you.]

Adair then offered to go on, but having told Mr. Bearcroft that he should confine himself to the imprisonment, the Court desired that it might stand over till next term to be argued fully. *Adair* said he should abandon the charge as to the charity money as not being sufficiently alleged.

In this term the case was argued by *Adair*, Sergeant, for the city, and by Bearcroft for the prosecutor.

Adair, Sergeant, for the city.—In arguing the point of imprisonment last term, an attempt was made on the other side to show that the Court must confine themselves to the second petition. As the subject of both petitions was before the court of aldermen, the argument cannot be confined to the [*384] second petition only, though perhaps that would be sufficient. *The second adopts the first, and gives the prosecutor notice of the whole. The language of the adjudication follows the language of the first petition, and yet it was argued that the court of aldermen had proceeded on the second only. [He then argued particularly upon the facts stated in the petitions and in the return.] It has been stated as a principle that nothing but an offence is a ground for removal, and that removal is a punishment. For this there is no authority. A man may be removed for non-user of his franchise. If voluntary, that non-user may be an offence, but the removal is equally justifiable, though it proceed from inability. This principle runs through all the cases. *R. v. Truebody*, Mayor of Exeter *v. Glide*, where Holt, differing from the rest, agrees to this principle, and takes a distinction between an alderman and a freeman. In *R. v. Mayor of Liverpool*, on the bankruptcy of a corporator, Lord MANSFIELD's expression, that "some one or more of the consequences of bankruptcy may eventually become a cause of amotion," must point to imprisonment. None of the cases require precision in the charge. It must be substantially charged so as to give notice, and that is sufficient. The return supplies the facts charged as to the constitution of the city. With regard to the charge of extortion from Parry, there is no decision in point. The case of a mixed offence is still open, and it has never been decided that a previous conviction is necessary. Shall the jurisdiction of the corporation be taken away because the party, having committed a corporate offence, has at the same time committed another offence? The two offences may be separated. The corporation might decide that the party had offended against his duty as a corporator, and the court of law might without inconsistency say, that it was not an offence in a person who was not a corporator. The doctrine contended for on the other side would prevent a removal till all the forms of legal proceeding were gone through in all their stages. Great mischiefs might in the mean time take place. In *R. v. Richardson* it seems to have been held, on *Baggs's* case, that it is only for want of the power of trial that a common-law offence requires a previous conviction. If so, the objection is less applicable here, for the court of aldermen are a court of record, and have in some instances a power of criminal jurisdiction. Cases exist of their imprisoning for contempts against the lord mayor being held [*385] good in *habeas corpus*. *The chancellor would remove a justice of peace for such an offence without conviction, on its being made out to his satisfaction, but he cannot remove an alderman from being a justice of the peace. It can only be done by judgment of ouster.

Lord MANSFIELD desired Mr. *Bearcroft* to confine himself to the ground of the imprisonment, and said that the Court were all of the opinion which they had intimated before as to the other grounds.

Bearcroft, in reply.—The prosecutor cannot be affected by anything in the first petition. No return can be helped by intendment. The order on the first petition was to attend; not to answer the charge, but by attendance to remove the inconvenience. The prayer of the second petition was, that the party might answer the allegations of the second petition. It may be admitted that particular precision is not necessary in the charge; but then it must be supplied by the adjudication, or it will be sufficient if the charge be particular and the adjudication general. One of the two must be precise. In stating the charge of imprisonment, it does not appear what was the number and amount of his debts, upon which would depend the probability of the party's return. As to the escape-warrants, the Court is called upon to intend that an insolvent act, yet to be made, will contain a clause excepting persons in custody under escape-warrants. [Lord MANSFIELD.—It refers to a general act, which says that no person in custody under an escape-warrant, &c., shall be discharged by a future insolvent act. It is the act passed after the burning of the prisons, St. 20 Geo. 3, c. 64.] It is attempted to supply the charge by the facts stated in the return, but the Court can look to nothing but what the prosecutor was charged with, and is adjudged to be true against him. A case may certainly be put in which, from length of imprisonment and the amount of debt, the inability to return may justify an amoval. But will the Court say that an alderman in execution for several debts, and two of them escape-warrants, is removable? [Lord MANSFIELD.—You must add the time. BULLER, J.—Laying the charge and proceedings together, the time does appear.] Even in the case of voluntary absence there must be a total abandonment and intention not to return. It might be another case if any *actual inconvenience had been suffered. If the Court should [*386] think the return insufficient, it will only be saying that a proper case has not yet been brought before them.

Lord MANSFIELD.—This is a new case on the point of imprisonment, but that is no objection to the Court determining it upon principle. The duty of an alderman requires in many cases personal attendance. It is certain, on the record, that the prosecutor had lain upwards of a year in prison from the first petition to the adjudication, and two of the causes of the imprisonment were under escape-warrants, which would prevent him from being discharged by any general insolvent act. The second petition adopts the first, and adds to it. The whole was before the court of aldermen as to the imprisonment, and they have adjudged it a ground of amotion. I have no doubt that it is a cause of amotion that a man is unable to perform the duties of his office.

WILLES, Justice.—There are two questions; 1st. Whether the imprisonment is sufficiently charged; and 2dly. Whether it is a sufficient cause of amotion. The second petition adopts the allegations of the first, and refers to it. In the charge the mischiefs arising from the imprisonment are stated—the non-representation in the courts of aldermen and of wardmote. Referring to the return, it appears that the prosecutor was imprisoned for a year and a quarter, and during that time could not attend any of the courts. There is a positive allegation in the second petition that he was in execution for several debts, and under two escape-warrants. I think this cause is sufficient to justify the amotion.

ASHURST, Justice.—I am of the same opinion. I think that an alderman is bound, independently of his oath, to attend—*non-user* (and it is in part a judicial office) is a sufficient cause of amotion from such an office. It is not

necessary that he should have been guilty of a crime. It is sufficient that the corporation has been prejudiced. Then does enough appear to show that he ought to be removed. In this summary proceeding no technical form of words is necessary. The first petition is by no means abandoned, but incorporated, and made one charge with the second, and the party accused is properly called on to answer the second petition, which contains the whole. How long must the corporation wait before they proceed? The alderman's [*387] attendance is necessary daily, and part of his business, that of his own ward, cannot be done by another. We must take it to be true that he had been in prison a year and a quarter, and without drawing any positive line, I think the facts here stated are sufficient.

BULLER, Justice.—I have looked into the question carefully, and I see no doubt. The Court of Aldermen find a sufficient part of the petition to be true, viz., the imprisonment. In the Doncaster case, it did not appear that the party was unable to attend. I consider the present case to amount to this, that an alderman in prison on execution, and under an escape-warrant, and having, in consequence, been unable to attend for a considerable time, and being not likely to be discharged, is removable. Several cases are very applicable, though there is none expressly in point. Imprisonment is stronger than voluntary absence, on account of the incapacity, and it is on the incapacity that I rely. That is insisted on in Plowden, Nevil's case, arg. 379, and also in Glide's case. These cases proceed on incapacity, and show that it is immaterial whether the incapacity be by the party's default or not. The corporation had suffered severely by his absence, and that absence was likely to continue. I am of opinion that his being imprisoned without a prospect of enlargement was a sufficient cause of amotion.

The return was allowed.¹

¹ But the non-residence of an alderman will not afford a sufficient ground for a mandamus commanding the corporation to meet and consider the propriety of removing him, unless his absence has been productive of some serious public inconvenience. *Rex v. Portsmouth*, T. 5 Geo. 4, 3 B. & C. 152; see also *Rex v. Heaven*, M. 29 Geo. 3, 2 T. R. 776.

As to the question of amotion for a mixed offence, see *Rex v. Derby*, T. 8 Geo. 2, Rep. Temp. Hardw. 153.

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*The KING *v.* MOORHOUSE.¹ June 14.

An indictment against overseers for not obeying an order of justices, must state precisely and positively that the order was served on them.

THIS was an indictment against the defendant for disobeying an order of two justices.

The indictment stated, That the Rev. Henry Wood, Doctor of Divinity, and William Walker, Esquire, two of his majesty's justices of the peace for the West Riding of the county of York (one whereof was and is of the quorum), did, by an order under their hands and seals, dated the 11th day of September, 1784, order the churchwardens and overseers of the poor of the township of Cleckheaton, in the said riding, to pay unto Sarah Firth, of the township of Cleckheaton aforesaid, one shilling and sixpence weekly, and every week, for and towards the support and maintenance of her, the said Sarah Firth, and her bastard child, until such time as they should be otherwise ordered, according to law, to forbear the said allowance. That the

¹ S. C. Cald. 554.

defendant on the 28th of September, 24 Geo. 3 (the said defendant then and still being churchwarden of the township of Cleckheaton aforesaid), not regarding the said order, nor the authority of the said justices (after the said order was delivered to the said Thomas Moorhouse, and after the service thereof), contemptuously, unlawfully, and unjustly, did refuse to give any obedience to the said order. To this indictment the defendant demurred, and the king's coroner and attorney (Mr. *Templer*) joined in demurrer.

Fearnley, for the demurrer.—It does not appear on the indictment that the defendant has been guilty of any offence. The power to overseers is given by the 43 Eliz., and it is to relieve the poor and impotent. 1st. There must be an application to the overseers. 2dly. There must be a refusal. 3dly. An oath before a justice that the party is poor and impotent, and that the overseer has refused, and then the overseer must be summoned. The Court will not intend criminality, and in this indictment it is not stated that the party was either poor or impotent, *while, unless she was both, [389] the justice had no power to make an order. It is not stated that the defendant acted as overseer of the poor; the churchwarden is a different officer. Nor is it stated that there was any demand made of the money. Though a man may have a wife and children, and only a guinea in the world, he may not still be poor, for he may be able to maintain them.

Law, contra.—The statute of Elizabeth makes the churchwardens overseers. It is to be presumed that the justices having jurisdiction have proceeded regularly, *Rex v. Venables*, T. 11 Geo. 1, 2 *Ld. Raym.* 1407. It is objected that it does not appear that the party was within their jurisdiction as being poor. This is a different case from a motion to quash the order, for here it is unappealed from.

Per Cur.—The Court think that the indictment is faulty in not positively alleging the service of the order upon the defendant, but only by way of argument and inference, viz., that after the order was delivered, he contemptuously refused, &c. The service is essential to make the defendant criminal.

Judgment for the defendant.¹

¹ An overseer is not indictable for not relieving a pauper, unless there is an order for his relief, or in case of immediate emergency. *Meredith's Case*, Russ. & Ry. C. C. B. 46.

The KING v. The Inhabitants of ASTLEY. *June.*

A woman pregnant with a child likely to be born a bastard, goes with the consent of the officers of the township where she is settled to inquire after the father, in order to give intelligence of him to the overseers. On her return she is delivered of the bastard in another township. Held, that the settlement of the bastard is in the latter township.

Two justices by their order removed Catharine Boardman, the natural daughter of Ellen, now the wife of John Hulme, late Ellen Boardman, single woman, aged two years and upwards, from the township of Astley, in the county of Lancaster, to the township of Little Hulton, in the same county. Upon an appeal to the Quarter Sessions for Lancashire they quashed the order, subject to the opinion of this Court on the following case:

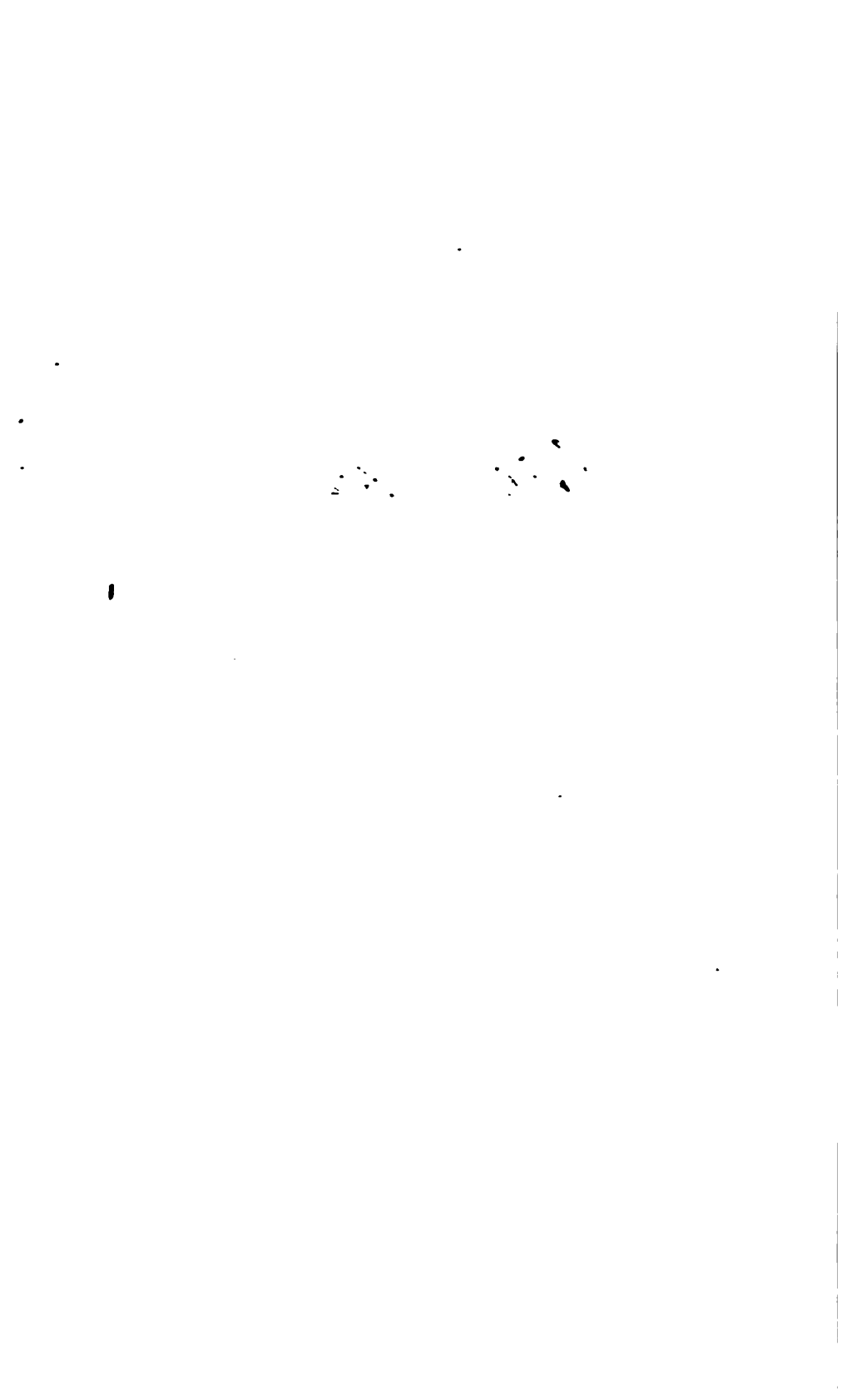
*The pauper was born a bastard in Little Hulton on the 7th of [390] August, 1782. On the 5th of that month, the mother went, as she had several times done before, with the knowledge, consent, and approbation of the overseers of Astley, where her legal settlement was, and where she then resided, to find out the father of the child, that she might give intelli-

gence of him to the township. She told the overseers of Astley, two or three days before she was delivered, that she would go to find out the father, and they desired she would, if she had an opportunity, but she then thought she was not within three weeks of her time. She went to Radcliffe, about eight computed miles from Hulton, supposing to find the father there, and stayed all night and the next day; while she was there, perceived herself to be ill, and therefore made what haste she could to return home, wishing to get to her own town. She got to Farnworth that day (the 6th of August), at night, and about 2 or 3 o'clock next morning, she set out for Astley, and got to Little Hulton, which was the direct road to Astley, where, her labor-pains increasing, she was furnished with a man and horse at her own request by a person (not the overseer) of Little Hulton, to carry her forwards to Astley, but she had not proceeded more than thirty rods, before her pains were so great that she was obliged to stop, and was delivered of the pauper in Little Hulton, in the highway, and about 100 yards from Tyldesley with Shackerley, a township intervening between Astley and Little Hulton. She and her child were immediately taken to a house in Little Hulton, where they were both taken care of by that township. There was no fraud on either side.

Cockell showed cause.—The birth of the child in Little Hulton was occasioned by the parish officers of Astley. The mother was sent by them on the public service of the parish, which must therefore be charged with the child. This case is within the principle of those already decided. A child born in gaol, *Elsing v. County Gaol of Herefordshire*, H. 2 Geo. 2, 1 Sess. Ca. 99, or pending an order of removal, afterwards reversed, *Westbury v. Eastham*, T. 3 Anne, 1 Salk. 121, 122, 532; or during the removal on the [*391] road, before the order has been served, *Jane Gray's Case*, Bott. 124; or when the mother, after removal, privately returns, and is delivered in the parish from which she was removed, *Landinaboe & Much Birch*.¹ In all these cases the child follows the settlement of the mother, and is not settled where born.

LORD MANSFIELD.—When a child is born pending an order, or in gaol, or there is any fraud, these are exceptions to the general rule; but in all other cases, the birth decides the settlement. Order quashed.

¹ M. 8 Geo. 1, 1 Str. 476, doubted by the reporter.



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1. An order of removal unappealed from, to a certificated parish from a third parish, is conclusive against the certificated parish on a removal to the certifying parish. *The King v. The Inhabitants of Ealing*, 12
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1. In an action of crim. con., evidence of a marriage *de facto* and cohabitation, followed by proof of a criminal intercourse between the defendant and a woman who passed for the plaintiff's wife, is sufficient to go to a jury without absolute proof of the identity of the former woman and the latter.

Semb. Evidence of a marriage by a person present is sufficient, without proving expressly the reading of the service.

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2. It is not a bar to an action of crim. con. that the plaintiff allowed the defendant to remain in his house after a suspicion of his wife's fidelity has been intimated to him. *Foley v. Lord Peterborough*, 294

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2. In the conveyance of an estate there was a covenant that the premises were free from incumbrances except particular leases. *Quere*, Whether these words affirm the leases, and whether parol evidence is admissible to show it was so intended? *Doe, lessee of Mount v. Roberts*, 306
3. *Quere*, Whether the declarations of the husband, who is dead, as to facts concerning his settlement, are admissible? If the settlement depends on a written instrument, it must be shown that due inquiry has been made after the written instrument, before parol evidence can be admitted. *The King v. The Inhabitants of St. Sepulchre*, 336

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EXECUTION.

The goods of a testator in the possession of his executors are taken and sold under a *ferri facias*, on a judgment against the executor for a debt of his own and with his consent: the property passes by such execution, notwithstanding the plaintiff in an action against the executor knew they were assets.

Semb. Otherwise if he had known of an unsatisfied debt, and so had colluded with the executor to make a *devastavit*. *Wheale, widow, v. Booth, sheriff of Kent*, 36

EXECUTOR.

Testator, a wine-merchant, directed by his will that A. B. and C. D. should carry on his trade, and he bequeathed to them his stock of wines. Before the death of testator, certain wines belonging to him arrived in a vessel at the port of London, and the vessel was reported. After his death the wines were entered. Held, that the executors and not the legatees were chargeable with the duties. *Stewart v. Denton, spinster, administratrix of Denton*, 219

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Where the information was for keeping two lurchers, and the conviction is for one, the conviction is good. *King v. Cottrell*, 350

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1. An indictment for disobeying an order of sessions on an appeal against a conviction for not giving a list of male-servants pursuant to statute 21 Geo. 3, c. 31, need not state the proceedings before the justices, nor that the servant comes within the description in the statute. *The King v. Mytton*, 333
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1. Usage is admissible in evidence to explain the construction of a policy of insurance in the parts written by the parties, as well as in the common printed form. If the question be whether the addition of a place by name in the policy would have varied the risk, or whether, on the other hand, such place was implied in the words actually used, it is material evidence in

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2. The sentence of a foreign Court of Admiralty, that a ship warranted neutral is lawful prize, is not conclusive evidence that the ship is not neutral, if the grounds of the sentence appear and do not show a breach of neutrality. *Salucci and another v. Johnson*, 224
3. In an action on a policy of a ship warranted to depart with convoy, if the ship sails without convoy, the assured is entitled to recover the premium. A usage in such case to return the premium, deducting a half per cent., is good. *Long and others v. Allan*, 276
4. Insurance on goods, with the usual memorandum, "Corn, fish, &c., warranted free from average, unless general, or the ship should be stranded." A quantity of fish, part of the goods insured, was so much damaged by the perils of the seas, that on putting into the port of Lisbon, on a survey by the Board of Health at that place, the fish was declared to be, and in fact was of no value. Held, that this was not a total loss of the fish. *Cocking and another, v. Fraser*, 295

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An insurance broker has no implied authority to pay to the assured losses, either total or partial, for the underwriter who employs him. *Bell and others, assignees of Bruce, a bankrupt, v. Auldjo*, 48

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It is no answer to a plea of set-off on a judgment recovered, that plaintiff has brought a writ of error to reverse the judgment, which is still depending.

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1. A lease to A. B., his executors, &c., for a year, and so from year to year, for so long time as it shall please the lessor and A. B., his executors, &c., does not expire on the death of A. B., but vests in his executors. A tenant from year to year may make a lease for 21 years. *Mackay, executor of Durne, v. Mackintosh, &c.* 213
2. Lease under power to lease in possession

was dated in March, to hold from Michaelmas, but not delivered till Michaelmas: semble the lease is good. *Doe, lessee of Mount, v. Roberts*, 306

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LIBEL.

On the trial of an indictment for libel, the only questions for the jury are the fact of publication and the truth of the innuendoes. The question of libel or no libel is necessarily for the sole consideration of the Court out of which the record comes, and on which the judge at the trial is not called upon to give his opinion to a jury. *Dias Willes*.

It is no answer to a charge of criminal publication of a libel to show that the defendant had been told it was libellous and not fit to be generally disseminated in the neighborhood, and that he printed it with a view to disprove the imputation of having intended to promulgate a libel. *The King v. Shipley*, 73

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Where a corporator is duly elected mayor, he may be compelled to take the office either by *mandamus* or indictment; but when it is admitted that the election has been merely a pretence and contrivance, the Court will grant a *writ of mandamus* under 11 Geo. 1 to proceed to another election. *The King v. The Mayor, Aldermen, Assistants, and Common Council, and the Free Burgesses of Colchester*, 14

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1. Overseers are not entitled to charge the amount of the salary of an assistant-overseer, though appointed with such salary at a vestry-meeting. *The King v. Welch and others*, 236
2. Though a place have only two houses, it may be a vill by reputation, and separate overseers may be appointed. *The King v. The Overseers of the Poor at Eyford*, 331

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1. 1. It is no answer to a plea of set-off on a judgment recovered, that plaintiff has brought a writ of error to reverse the judgment which is still pending.
2. If the plaintiff, in making up the record, makes the time of plea pleaded appear posterior to the date of the subject-matter pleaded, when it was not so in fact, the Court will direct an amendment at plaintiff's cost if he resists.
3. A judgment recovered after action brought, and before plea pleaded is a good set-off. *Reynolds v. Beering*, 181
2. Plea to debt on bond, that after the making of the bond the plaintiff, by a deed of defeasance by him made, and sealed with his seal, released all obligations, &c., and delivered the said writing to one A. B., as an escrow to be by him delivered to the defendant on a certain condition; that the defendant performed the condition, but that before A. B. could deliver the deed of defeasance plaintiff got the same covinously out of A. B.'s possession and detained it. Replication that the writing

in the plea mentioned was not the deed of the plaintiff, and concluding to the country. On demurrer, held good. *Slater v. Carne*, 222

3. Covenant in a charter-party that if a vessel should be captured a sum of £975 should be paid for the vessel, according to an appraisement annexed. Plea, that by the appraisement the tackle, &c., were valued at £313 15s., and that before the capture, by tempestuous weather, &c., the tackle, &c., had been damaged to the amount of £300, and as to the residue plea of payment. On the demurrer, the plea was held bad. A person entering into a charter-party in his own name on the behalf of government is personally liable. *Cuningham v. Collier, Bart.*, 233
4. Declaration on a bail-bond stated the defendant was arrested by virtue of a writ, "before then, to wit, on the 2d November, issued out of the court of our lord the king before the king himself, the said court then and there being held at Westminster." Held, bad in special demurrer. A variance between the sum in the special original and the sum in the condition of the bail-bond is immaterial. *Atkinson, assignee of Hopkins, and Bates, sheriff of Middlesex v. Sawnderson*, 252
5. In *detinue* the plaintiff must show a right to have the goods delivered to him. One of several defendants may pray that the plaintiffs and the other defendants shall interplead. *Land v. Lord North, and the Governor and Company of the Bank of England*, 266

See CONDITION PRECEDENT, No. 1.

POOR-RATE.

1. The assessment to the land-tax, if it appears doubtful on the face of the rate whether it be on the landlord or tenant, is presumed to be on the tenant. *The King v. The Inhabitants of St. Lawrence*, 190
2. Where the receipt of the collector of the land-tax expresses the sum paid to be so much assessed upon the landlord, it must be presumed that the landlord was rated (if not that the payment also was by him), and therefore that the tenant gained no settlement. *The King v. The Inhabitants of St. James*, 200
3. Where an act of parliament directs a rate to be made on the occupiers of land, &c., and on all persons using and having stocks and personal estates, &c., in equal proportion, according to their several and respective values and estates, and it appears that the rate was not made in equal proportion, it will be quashed. *The King v. The Inhabitants of Fakenham*, 261

POWER.

See LEASE, No. 2.

PRACTICE.

1. After a judge's order for time to enter the issue, the defendant may sign judgment of *non pros* immediately on the expiration of the time, without giving the

plaintiff twenty-four hours more. *Davies v. Cooper*, 5

2. On trial of an indictment for a misdemeanor, either by commission of *oyer* and *terminer* or jail-delivery, the defendant must appear in person (*semb.* that this is by force of the recognizance), but, after appearance, may be dismissed on entering into another recognizance to appear to receive judgment. *The King v. Meyler*, 18
3. A defendant charged as endorser of a note may obtain a rule to inspect it on affidavit that he never endorsed or had in possession any such note. *Cesar v. —*, 11
4. The Court will compel a plaintiff to produce written documents on which an action is founded for the defendant to inspect and copy, if the defendant states facts which throw a doubt upon their existence or import. *Semb.* The Court will interfere in all cases where a discovery might be obtained by a bill in equity. *Barry v. Alexander*, 15
5. The Court will not order an attorney to deliver up deeds which he swears were delivered to him for a special purpose, which he has fulfilled. *Smith v. Cotterell*, 205
6. In an action for work and labor, the Court will compel the plaintiff's attorney to give a note in writing of the plaintiff's trade and residence, and also to give a view of the plaintiff. *Collinson v. Gill*, 206
7. Where the plaintiff sues out process as assignee, and declares in his own right, the proceedings may be set aside, but the Court will allow the plaintiff to amend on payment of costs. *Meggs and another v. Ford*, 259

See SHERIFF, No. 1. OYER, No. 1 and 2. PROCESS. PLEADING, No. 1.

PRIZE AGENTS.

- A. and B. being joint prize agents, A. is imposed on by persons falsely pretending to be sailors, to whom he pays a sum of money, which he is subsequently compelled to pay again to the persons really entitled. B. is not bound to contribute to the sum so paid. *M'Ivreath v. Margetson*, 275

PRIZE-MONEY.

1. A captain in the army sent with his company on board a man-of-war (by order of the admiral of the fleet with which they were sailing), and there acting as marines, is not entitled to share prize-money as captain of marines; if he were so entitled he might maintain an action in a court of law to recover the prize-money. *Mackenzie v. Mayler* and others, 3
2. A seaman enters on board of a privateer under an agreement to receive prize-money instead of wages, and that unless he continue on board six months he shall forfeit his right to prize-money. During the six months he is impressed on board a king's ship; and after being impressed enters on board that ship and receives bounty. Held, that this is no forfeiture of the prize-money to which he had become

entitled during his service on board the privateer. *Paul v. Eden* and another, 280

3. An admiral who supersedes another admiral and takes him under command is entitled to 1-8th part of prizes captured after such command, but under orders issued by the admiral who has been superseded. *Pigot v. White*, 302

See APPRENTICE, No. 1.

PROCESS.

If a defendant who is served with process in a wrong name appears by his right name, the irregularity is cured. *Bogue v. Miles*, 180

PROMISSORY NOTE.

It is no ground for staying the trial of an action on a promissory note given for the amount of a penalty levied under the revenue laws, that the party on whose evidence the conviction proceeded has been indicted for perjury, and a true bill found. *Aysheford v. Charlott*, 210

See USURY.

RENT.

See DISTRESS.

REPLEVIN.

See DISTRESS.

SEDUCTION.

No action will lie for debauching a daughter, though the mother maintain her and her child during her lying-in, unless on the ground of the loss of service. *Satterthwaite, widow, v. Dewhurst*, 315

SERVANT.

See MASTER. SETTLEMENT, No. 1.

SET-OFF.

See JUDGMENT, No. 1.

SETTLEMENT.

1. Where a servant is disabled by an accident, and after his recovery tenders himself within the year to return to his master, who refuses to receive him, the settlement of the servant is not prevented by such refusal. *The King v. The Inhabitants of Sharrington*, 11
2. A certificate man purchased a freehold cottage in the township to which he was certificated, and died, leaving a widow and three children residing in the cottage at the time of his death, and who continued to reside there for ten weeks. Held, that the widow acquired a settlement in right of her quarantine, which she communicated to her children. A child of ten years of age removed from her mother's house on account of illness remains part of her mother's family. *The King v. The Inhabitants of Long Wittenham*, 193
3. A boy under 21 years of age is hired out

- by his father for several years successively, the father receiving his wages and an allowance for his washing, and the boy returning to his father's during illness. This is no emancipation. *The King v. The Inhabitants of Stretton*, 208
4. A hiring at weekly wages for so long time as the master wants a servant is not a hiring for a year, and gains no settlement. *The King v. The Inhabitants of Elslack*, 211
5. Where an apprenticeship is intended, but, to save expense, an unstamped agreement is entered into, whereby the pauper agrees to serve the master in his business of a carpenter for four years, it is a defective apprenticeship, and not a hiring and service. *The King v. The Inhabitants of Highnam*, 238
6. If a wife is removed, and the order unappealed from, such removal is conclusive as to the husband's settlement, although it is not stated in the order that she was his wife. *The King v. The Inhabitants of Towcester*, 240
7. A girl of ten years of age who is by accident unable to maintain herself, and whom her father is unable to maintain, is placed in the workhouse, where she is supported and remains. Held, that this is no emancipation. *The King v. The Inhabitants of Broadhembury*, 241
8. A servant a few days before the expiration of the year's service is committed for getting a bastard child, the master being one of the overseers and one of the persons apprehending him. At the expiration of the year he gives a bond to indemnify the parish, and is released. His master then pays his wages, deducting a sum for the time he has been in custody. Held, that no settlement is gained by this service. *The King v. The Inhabitants of North Cray*, 243
9. A negro brought into this country by her master, and continuing to serve him here for a year, does not gain a settlement, for there is no hiring. *The King v. The Inhabitants of Thames Ditton*, 300
10. The consent of the first master of an apprentice to a service under another master, is sufficiently expressed by his giving the apprentice a character as servant. *The King v. The Inhabitants of St. Mary, Lambeth*, 329
11. A woman pregnant with a child likely to be born a bastard, goes with the consent of the officers of the township where she is settled to inquire after the father, in order to give intelligence of him to the overseers. On her return she is delivered of a bastard in another township. Held

that the settlement of the bastard is in the latter township. *The King v. the Inhabitants of Astley*, 388

See CERTIFICATE.

SHIP.

See INSURANCE, CARRIER, MORTGAGE, BANKRUPTCY.

SLANDER.

In an action for slander *per quod*, it is not sufficient to prove equivalent words of slander, though explained in the same sense by the defendant himself. *Armitage, spinster, v. Dunster*, 291

TRESPASS.

An officer acting under a warrant granted by commissioners of excise under stat. 10 Geo. 1, c. 10, is not liable as a trespasser although no goods are found, nor is it necessary for him to prove that he had reasonable grounds of suspicion. *Cooper v. Boot*, 339

TRIAL.

See PROMISSORY NOTE, No. 1.

TRUSTEES.

See BANKRUPTCY, No. 1. EJECTMENT, No. 1.

USURY.

A. lends B. £60, and at the same time takes a note from B. at three months for £65 5s.; in an action for money lent, held that A. could not recover the £60. *Scott v. Nicholl*, 314

VARIANCE.

See PLEADING, No. 4.

VILL.

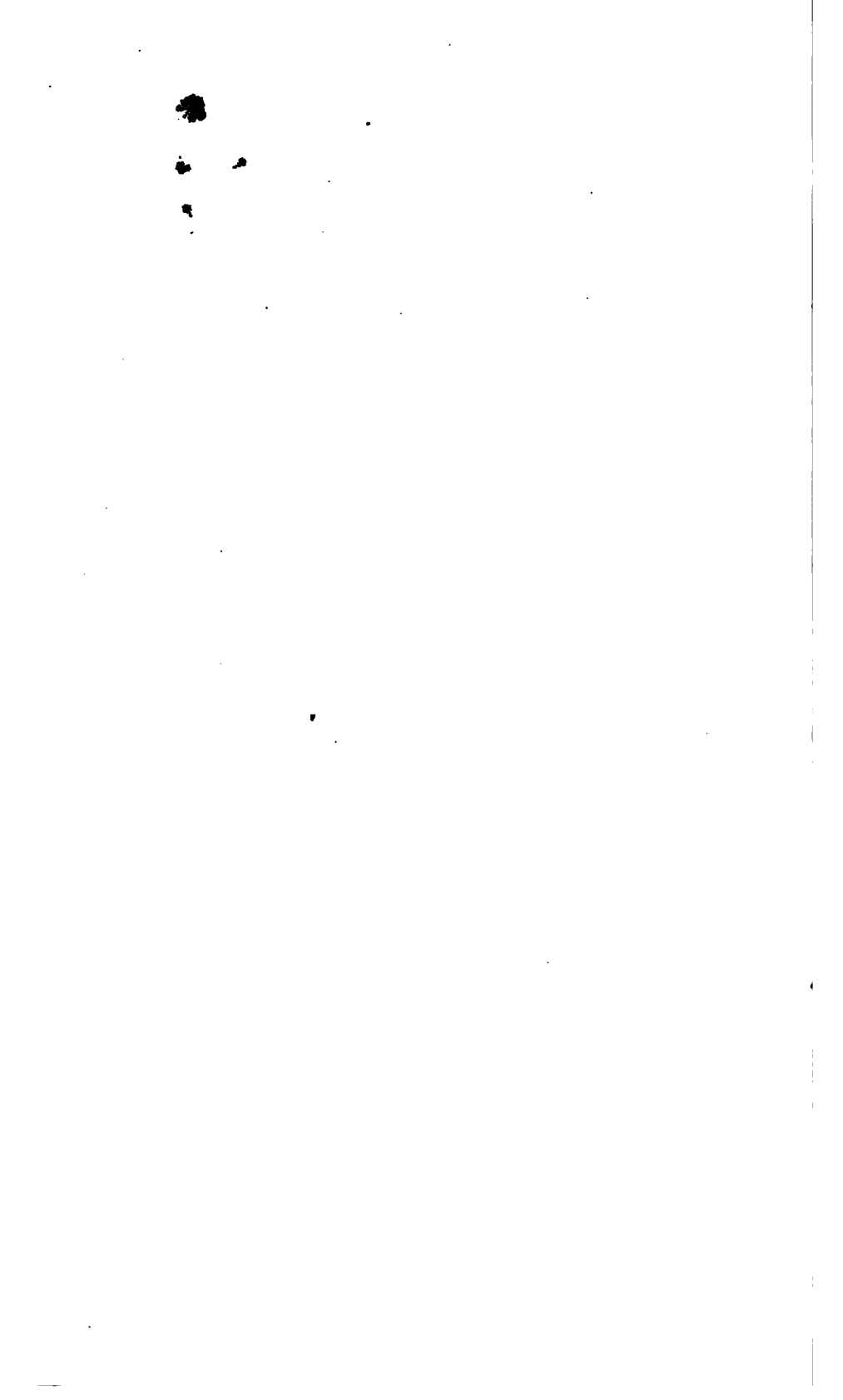
See OVERSEERS, No. 2.

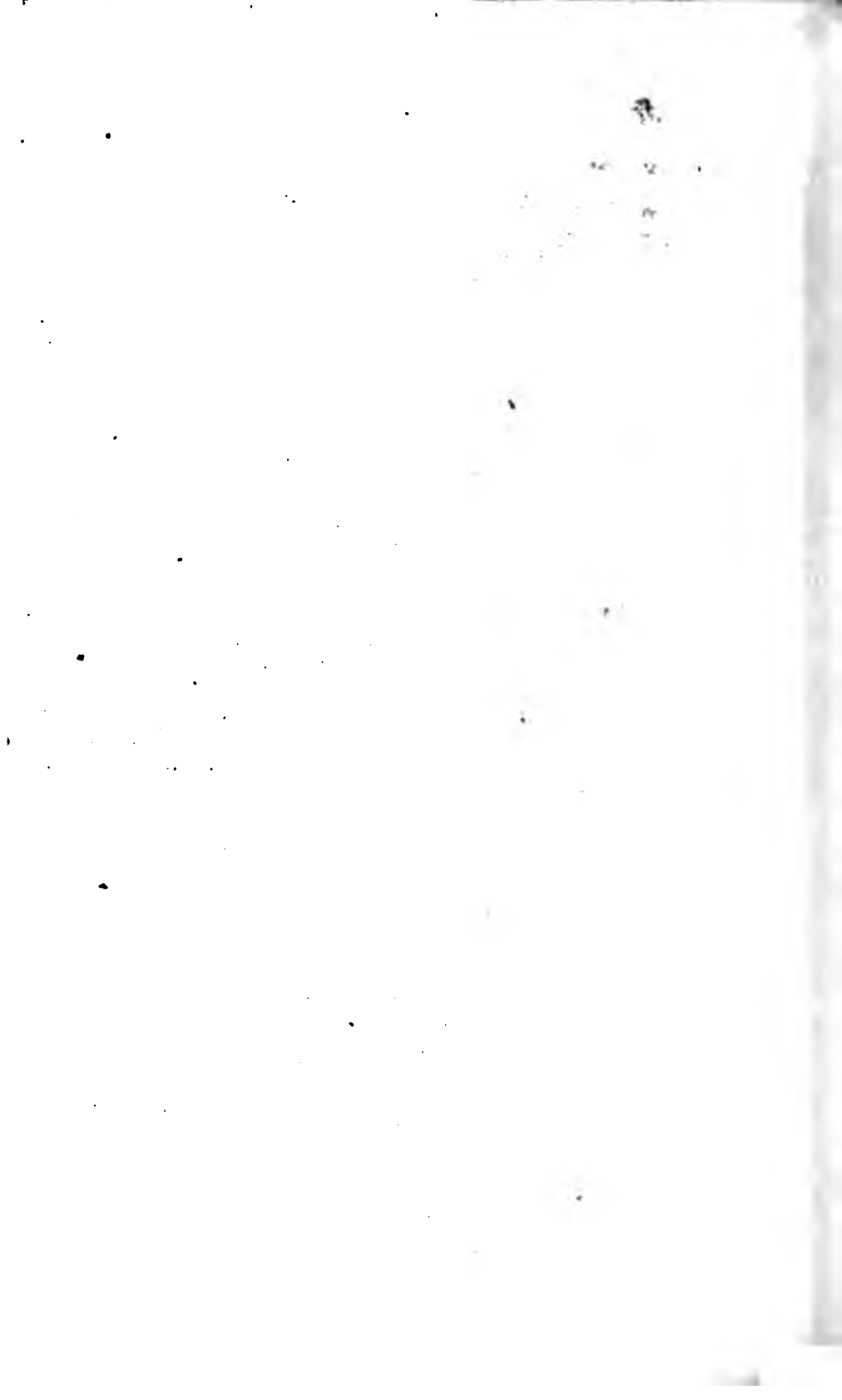
WAGES.

See APPRENTICE, No. 1.

WITNESS.

An inhabitant of a parish is a good witness on a conviction under 5 Anne, c. 14, for keeping a lurcher to kill game, if it do not appear that he is an inhabitant paying scot and lot; and the Court will not presume he is such an inhabitant. *King v. Cottrell*, 350









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